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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CROSS COUNTRY BANK, INC.,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK, by ANDREW CUOMO, Attorney General of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the New York Court of Appeals fail to abide by the dictates of the Supremacy Clause in holding that the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), did not preempt the Attorney General of the State of New York (the "Attorney General") from asserting a claim under state law that credit card solicitation disclosures were misleading and deceptive when: (i) for the explicit legislative purpose of establishing nationwide uniformity in credit card solicitation disclosures, Congress amended TILA in 1988 to include an express preemption provision, 15 U.S.C. § 1610(e), that barred the States from directly or indirectly regulating the content or format of disclosures in credit card solicitations and vested the Board of Governors of the Federal Reserve with exclusive authority to prescribe the content of all disclosures in credit card solicitations and the manner in which they are presented; (ii) the Court of Appeals allowed the Attorney General to assert a claim that the disclosures at issue were insufficient and should be presented in a different manner, even though they fully complied with the requirements set forth under TILA; and (iii) the New York Court of Appeals affirmed the issuance of an injunction barring the use of the disclosures that fully complied with the requirements established under TILA?

CORPORATE DISCLOSURE STATEMENT

The Caption of the Case Contains the Names of all but one of the Parties to the Proceeding in the Court whose Judgment is sought to be reviewed. The other party was Applied Card Systems, Inc.

Pursuant to Supreme Court Rule 29.6, Petitioner hereby states that it is a wholly-owned subsidiary of Applied Card Holdings, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE DOCUMENT	ii
TABLE OF AUTHORITIES	vi
PRELIMINARY STATEMENT	1
CITATIONS OF DECISIONS	4
STATEMENT OF JURISDICTION	4
STATUTE AT ISSUE	4
STATEMENT OF THE CASE	4
I. Nature of the Proceeding	4
II. The Proceedings Below	5
III. The Court of Appeals' Preemption Ruling	7
IV. Statement of Facts	15
V. The Attorney General's Claims against CCB	19
REASONS WHY CERTIORARI SHOULD BE GRANTED	21

PAGE

POINT I IN DEROGATION OF THIS COURT'S HOLDINGS, THE COURT OF APPEALS' DECISION FUNDAMENTALLY OVERRIDES AND NEGATES TILA'S TOTAL PREEMPTION OF STATE REGULATION OF CREDIT CARD SOLICITATION DISCLOSURES 22

A. Congress Intended that TILA Totally Preempt State Law Regulation 25

B. TILA Preempts the Entire Field of Credit Card Solicitation Disclosure Requirements..... 29

POINT II THE COURT OF APPEALS' DECISION WILL DESTROY THE NATIONAL UNIFORMITY ESTABLISHED BY TILA 34

CONCLUSION 38

APPENDIX

People of the State of New York ex rel. Spitzer v. Applied Card Systems, Inc., 11 N.Y. 3d 105 (2008)..... 1a

PAGE

People of the State of New York ex rel. Spitzer v. Applied Card Systems, Inc., 27 A.D.3d 104 (3d Dep't 2005) 51a

15 U.S.C. § 1610 ..... 60a

TABLE OF AUTHORITIES

Cases: PAGE

Arkansas Electric Cooperative v. Arkansas Public Service Commission, 461 U.S. 375 (1983) 33

Barnhart v. Thomas, 540 U.S. 20 (2003) 11

California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987) 25

California v. Federal Energy Regulatory Commission, 495 U.S. 490 (1990) 28

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 25

Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001) 30

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 30

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 30

Medtronic v. Lohr, 518 U.S. 470 (1996) 14, 25

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 30

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) 8-9

PAGE

Northern Natural Gas Co. v. State Corporation Commission, 372 U.S. 84 (1963) 29

Pilot Life Insurance Co. v. Dedaux, 481 U.S. 41 (1987) 30

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 34

Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008) 2, 10, 21, 23, 32

Rosario v. Diagonal Realty, LLC, 8 N.Y.3d 755 (2007), *cert. denied*, 128 S. Ct. 1069 (2008) ... 25

Rowe v. New Hampshire Motor Transportation Association, 128 S. Ct. 989 (2008).....25, 30

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 28

State Farm Bank, FSB v. Reardon, 539 F.3d 336 (6th Cir. 2008) 37

Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) 2-3, 34

Statutes and Other Authorities:

15 U.S.C. § 1257(a) (1988) 4

15 U.S.C. § 1601(a) (1976).....13, 25

15 U.S.C. § 1610(a)(1) (1994).....13, 26

15 U.S.C. § 1610(e) (1994) .....*passim*

PAGE

15 U.S.C. § 1632 (1988) 26, 27

15 U.S.C. § 1637(c) (2005) ..... *passim*

15 U.S.C. § 6807(a) (1999) 26

21 U.S.C. § 360k(a)(1) (1976) 23, 24

12 CFR Part 226, Supp. I (2008) 26, 31

12 C.F.R. § 226.5a (2007) 17, 29

12 C.F.R. § 226.28(d) (2008) 29

21 C.F.R. § 808.1(d)(1) (2008) 23

Fair Credit and Charge Card Disclosure Act, Pub. L. No. 100-583, 102 Stat. 2960 (1988) 26

134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988) 36

Credit and Charge Card Disclosures, 54 Fed. Reg. 13,855 (Apr. 6, 1989) 27

Truth in Lending, 72 Fed. Reg. 32948 (June 14, 2007) 33

Truth in Lending, 73 Fed. Reg. 28866 (May 19, 2008) 33

Joseph W. Gelb & Peter N. Cubita, *The Fair Credit and Charge Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus. Law. 941 (1988-1989) 35

PAGE

Jonathan A. Sheldon, *Unfair and Deceptive Acts and Practices* (6th ed. 2004) 36

Brief for the State of New York, et al. as Amici Curiae, *Riegel v. Medtronic, Inc.*, No. 06-179, 2007 WL 2456949 (Aug. 27, 2007)..... 23

PRELIMINARY STATEMENT

In defiance of an express and unambiguous federal prohibition against state regulation of consumer credit card disclosures, the State of New York has unilaterally seized the authority to supplement the uniform regulatory system mandated by Congress, and has imposed a separate and parallel scheme of state regulation. Despite the plain command in the federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"), that, without exception, federal disclosure requirements "supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation," 15 U.S.C. § 1610(e) (1994), the New York Court of Appeals, over a vigorous dissent, held that New York could impose both additional disclosure obligations and penalties for not having made those additional disclosures. The Court of Appeals also ignored the interpretation of the Board of Governors of the Federal Reserve (the "Federal Reserve Board"), the regulatory agency charged with exclusive responsibility for implementing TILA's disclosure requirements as well as preserving the integrity of the credit system, and substituted its erroneous interpretation of TILA.

To support its refusal to abide by Congress' express preemption of state law, the Court of Appeals recycled the discredited argument that state tort and consumer protection laws do not impose additional disclosure requirements, holding that New York law here merely requires parties "to refrain from fraud, deception and false advertising . . ." and does not require a party "to

disclose anything." (11a) But as this Court has recognized repeatedly—most recently in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008)—such state laws "impose liability 'premised on the existence of a legal duty,' and a tort judgment [here, a judgment under a state false and deceptive practices statute] therefore establishes that the defendant has violated a state-law obligation. And while the common law remedy is limited to damages, a liability award 'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id.* at 100 (citations omitted).

The impact of the Court of Appeals' disruption of the federal regulatory structure is important and immediate. The nationwide regulation mandated by Congress strongly militates against dismissing this decision as merely an outlier or letting the issue percolate through the lower courts. New York is the financial capital of the country. Many of this country's largest national banks are headquartered there. Virtually all of them have branches there. They and all the nation's other issuers of credit cards routinely do business with consumers in New York, and they would have to modify their credit card disclosures made to those consumers to satisfy the supplemental New York requirements. And beyond this enormous impact, there would be vast material repercussions, as virtually every State maintains laws paralleling the New York law at issue in this case.

Private plaintiffs and state Attorneys General have assiduously tried to chip away at federal uniformity. As this Court recognized in *Watters*

v. Wachovia Bank, 127 S.Ct. 1559 (2007), those efforts have had adverse consequences in direct contravention of Congressional intent. Allowing the New York Court of Appeals' decision to stand would unleash countless state law challenges to credit card practices in an area that Congress declared to be exclusively within the province of the federal government. Inevitably, the proliferation of cases judging the adequacy of companies' disclosures under state law standards will undermine the uniform nationwide system of regulation of the issuers of credit cards, which includes a substantial portion of the financial services industry in the United States.

At a time when financial institutions are facing many challenges, the Courts of Appeals' erroneous decision threatens nationwide harm to the lending industry by imposing the very burdens that Congress specifically decided to prevent when it enacted Section 1610(e) after 20 years of regulation under TILA. The costs of complying with the laws of 50 different states—and potentially many more localities—that credit card issuers will likely incur when other States follow the Court of Appeals' reasoning will substantially impair the ability of those institutions to offer credit to consumers across the nation. Indeed, it is that very harm that caused Congress to mandate in plain and unambiguous language that there be exclusive federal regulation of credit card disclosures. And it is that very harm that urgently requires this Court to review the decision of the Court of Appeals.

CITATIONS OF DECISIONS

People of the State of New York ex rel. Spitzer v. Applied Card Systems, Inc., 11 N.Y.3d 105 (2008) (1a-50a); *People of the State of New York ex rel. Spitzer v. Applied Card Systems Inc.*, 27 A.D.3d 104 (3d Dep't 2005) (51a-59a).

STATEMENT OF JURISDICTION

The Judgments of the Supreme Court of the State of New York, Albany County, were entered on June 23, 2004 and June 26, 2006. On June 26, 2008, the Court of Appeals of the State of New York affirmed the Judgments. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTE AT ISSUE

15 U.S.C. § 1610 (1994). (60a-62a)

STATEMENT OF THE CASE

I. Nature of the Proceeding

In April 2003, the Attorney General of the State of New York (the "Attorney General") commenced a special proceeding under New York Executive Law § 63(12), alleging that petitioner Cross County Bank ("CCB") had violated Sections 349 and 350 of the New York General Business Law.[1] The Attorney General broadly alleged that

[1] The Attorney General also asserted claims against CCB's affiliate Applied Card Systems, Inc. ("ACS") with respect to the collection practices that ACS employed. The

CCB "deceptively induce[d] [consumers] to enter into onerous and confusing credit card agreements" that required the payment of high fees and costs in return for only "a minimal amount of usable credit." The Attorney General sought to enjoin CCB from engaging in such conduct, as well as an award of restitution and penalties.

On July 11, 2003, CCB and ACS filed their joint Verified Answer, in which they asserted numerous affirmative defenses. As one of its affirmative defenses, CCB asserted that its disclosures fully complied with TILA's requirements and federal Regulation Z promulgated thereunder and that the Attorney General therefore could not assert any claims under Sections 349 and 350.

II. The Proceedings Below

The proceedings before the trial court were bifurcated. On May 28, 2004, the trial court rendered a decision and shortly thereafter entered a partial judgment with respect to liability and injunctive relief. On January 27, 2006, the trial court entered an order assessing penalties, restitution and costs, and thereafter entered a second judgment. CCB appealed from each of those judgments to the Appellate Division, Third Department (the "Appellate Division"), including on the ground that 15 U.S.C. § 1610(e) preempted the Attorney General's claims. (51a-59a) On September 4, 2007, the Court of Appeals granted leave to appeal. On June 26, 2008, the Court of Appeals entered its Opinion and Order, affirming

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claims asserted against ACS are not the subject of this petition.

each of the Appellate Division's Orders, including with respect to the issue of preemption. (1a-50a)

On February 11, 2004, the trial court issued an Order "to first address those issues which can be readily determined at this juncture." Among other things, the trial court dismissed CCB's defense under TILA. On February 25, 2004, CCB moved for reargument, and the trial court orally ruled that "the TILA preemption claim [did] not apply to the deceptive and fraudulent practices that are the subject of this proceeding under the Executive Law and the General Business Law."

On May 28, 2004, the trial court issued its decision granting injunctive relief. It held that, as a matter of law, CCB's credit card solicitations violated Sections 349 and 350 of the General Business Law. On June 23, 2004, the trial court entered a Judgment (the "First Judgment") permanently enjoining appellants "from engaging in the fraudulent, deceptive and unlawful acts and practices alleged in the Verified Petition."

On January 27, 2006, the trial court entered its Order directing respondents to pay restitution, penalties and costs. On June 26, 2004, the Court entered a Statement of Judgment reflecting the monetary award set forth in the January 27 Order (the "Second Judgment").

In 2004, CCB and ACS appealed to the Appellate Division from the First Judgment. In a Decision and Order entered December 1, 2005 among other things, the Appellate Division held that TILA did not preempt the Attorney General's claims because they were directed at unfair and deceptive practices, as opposed to disclosure obli-

gations. (58a) The Appellate Division held in a conclusory manner that the Attorney General was not seeking to establish that the disclosures were inadequate.[2] (58a)

In 2006, the parties cross-appealed to the Appellate Division from the Second Judgment. On April 5, 2007, the Appellate Division issued a Decision and Order modifying the remedies granted (the "2007 Appellate Division Decision").

CCB and the Attorney General thereafter each moved for leave to appeal to the Court of Appeals. Among other things, CCB sought leave to appeal from the Appellate Division's decision that TILA did not preempt the claims asserted by the Attorney General. On September 7, 2007, the Court of Appeals granted the two motions. On June 26, 2008, the Court of Appeals issued its Opinion and Order affirming the Judgments, including the dismissal of CCB's preemption defense.

III. The Court of Appeals' Preemption Ruling

The pertinent issue before the Court of Appeals was whether Section 1610(e) of TILA preempted the Attorney General's attempt to impose additional disclosure requirements on CCB. Section 1610(e) states:

> The provisions of subsection (c) of section 1632 of this title and subsections (c), (d),

[2] The Appellate Division held that the disclosures violated Sections 349 and 350 of the General Business Law because they did not disclose enough information and should have been presented in a different manner. (55a-57a)

> (e) and (f) of section 1637 of this title shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c) of this title or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

15 U.S.C. § 1610(e).

In rejecting CCB's preemption defense, a majority of the Court of Appeals read Section 1610(e) as preempting state actions only to the extent that the relief sought conflicted with the requirements of TILA and Regulation Z. (9a-10a) In a detailed and carefully reasoned dissent, however, Judge Read criticized the majority for distorting the plain meaning of Section 1610(e), which expressly states that TILA's credit card solicitation disclosure requirements preempt state law, as well as for refusing to abide by Congress' express intent that there be national uniformity with respect to the regulation of credit card solicitations. (40a-41a).

The majority began its analysis by quoting inaptly from a principle articulated by this Court regarding assertions that state action is impliedly (as opposed to explicitly) preempted, *i.e.*, Congress is presumed not to supplant state law unless its intent is clear and manifest. (8a-9a) (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*,

514 U.S. 645, 654 (1995)). It then concluded, without any support in the statute, that Section 1610(e) does not preempt every state law concerning disclosures in credit card solicitations and applications:

> Instead, it preempts those state laws that relate to "disclosure of information," in credit card applications and solicitations "subject to the requirements of section 1637(c) [of TILA]," not those that prevent fraud, deception and false advertising. Preemption is limited, then, to laws that purport to alter the format, content, and manner of the TILA-required disclosures and those that require credit issuers to affirmatively disclose specific credit term information not embraced by TILA or Regulation Z.

(10a) (citations omitted). The majority thus concluded that the Attorney General's claims were not preempted because Section 349 of the General Business Law requires a party merely to "refrain from fraud, deception and false advertising . . ." and does not require a party "to disclose anything." (11a)

The majority refused to follow this Court's precedent regarding construction of the phrase "relating to" as having a meaning that "express[es] a broad preemptive purpose." (13a-14a) (citations omitted). Instead, the majority disregarded the Court's precedents, and concluded that the Attorney General's claims were "too tenuous, remote or peripheral" to be "related to" the matters preempted under Section 1610(e). (14a) The majority held that its decision would not

interfere with the system established by Congress based on the unsupported assertion that it does not require CCB to alter any of the disclosures or to disclose any additional terms. (17a)

The majority stated that the constitutional principles articulated by this Court last term in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), are not governing for two reasons. (16a-17a) The majority recited its conclusion that Section 1610(e) does not apply to state laws prohibiting fraud or deception. (17a) It also asserted that the Attorney General's success against CCB will not " 'disrupt[ ] the federal scheme' of disclosure mandated under TILA" because no additional disclosure requirements are imposed. (*See* 17a) The majority took comfort from its belief that Congress did not preempt a State's use of unfair trade practices laws, and observed that Section 349 is just such a statute. (20a) The majority, however, did not address TILA's express limitation placed on a State's right to employ such statutes. (*See* 20a-22a)

In her comprehensive dissent, Judge Read began by stating that Section 1610(e) "preempts the Attorney General's bid to impose disclosure requirements" and that the "majority reache[d] the opposite conclusion by dint of misreading TILA's special preemption rule for credit or charge card applications or solicitations." (29a) Judge Read identified the fundamental flaw in the majority's reading of Section 1610(e):

> The majority reads the clause "which is subject to the requirements of section 1637(c)" to modify "information." Accordingly, the majority reasons, "[t]he scope

of the section 1610(e) preemption is . . . *expressly limited* to state laws relating to disclosures *specifically required* under section 1637(c)" [17a] (emphases added). The majority therefore concludes that "there is no preemption here because neither CCB's claims nor the relief it was granted below have any effect upon these disclosures" [15a]. That is, because there is no conflict between TILA's disclosure requirements and New York's consumer protection laws, CCB may (and indeed must) devise a solicitation complying with both federal and state law.

But the majority's reading of the statutory text is not correct. It completely

"disregards—indeed, is precisely contrary to—the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . While this rule is not an absolute and can assuredly be overcome by other indicia if meaning, . . . construing a statute in accord with the rule is quite sensible as a matter of grammar" (*Barnhart v Thomas*, 540 US 20, 26 [2003] [quotation marks omitted]; *see also* 2A Singer and Singer, *Statutes and Statutory Construction* § 47:33, at 487 [7th ed 2007] ["Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent"]).

> Here, the limiting clause "which is subject to the requirements of section 1637(c) immediately follows and therefore modifies "any credit or charge card application or solicitation," *not* "information."

(30a-31a) (emphasis and ellipses in original).

Judge Read reviewed the position of the Federal Reserve Board, observing that: "[t]he Federal Reserve Board, which implements section 1610(e) through its Regulation Z (12 CFR Part 226), disagrees with the majority's textual analysis . . . ." (31a). She quoted extensively from the text of Regulation Z and the Federal Reserve Board's Commentary, including the statement that "[s]tate laws relating to the disclosure of credit information on credit or charge card applications and solicitations subject to the requirements of [15 USC § 1637[c]) . . . are preempted." (31a-32a) (ellipsis in original; citations omitted). Judge Read noted that the Federal Reserve Board has concluded that:

> TILA supplants State law "requirements" that "relat[e] to the disclosure of credit information" in certain credit or charge card applications or solicitations (i.e., those that the Board has determined to be subject to the requirements of 15 USC § 1637[c]); thus, preemption is not limited to "state laws relating to the disclosures specifically required under section 1637(c)". The Board's view in this regard is entirely consonant with the statute's

> text, and with Congress' purpose in adopting a special preemption rule in the first place.

(32a-33a) (citations omitted). She then reviewed the history of TILA and Regulation Z to substantiate this conclusion. (33a-38a). She finished that analysis by concluding:

> As the discussion of the evolution of TILA preemption illustrates, before Congress adopted the special preemption rule, states supplemented federal credit disclosure requirements with regularity. If Congress had wanted this state of affairs to continue, there would have been no need for it to supplant the inconsistency/contradictory standard in section 1610(a)(1) (as interpreted by the Board in Regulation Z) with the special preemption rule in section 1610(e). By reading the special preemption rule as it does, the majority has undone Congress' handiwork: the majority has effectively reinstated the inconsistency/contradictory standard for disclosures on credit or charge card applications or solicitations. While the majority cloaks its interpretation of section 1610(e) in the garb of the presumption against preemption of state law [16a-17a], the presumption does not empower a state court to circumvent Congress' will as expressed in non-ambiguous statutory language ("In all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be super-

> seded by the Federal Act *unless that was the clear and manifest purpose of Congress*," *Medtronic v Lohr*, 518 US 470, 485 [1996] [emphasis supplied, internal quotation marks and citations omitted]).

(40a-41a) (ellipsis and emphasis in the original).

Finally, Judge Read explained why the majority could not justify its position that there is no preemption on the ground that the Attorney General was enforcing only a statute that prohibited unfair or deceptive acts and practices. Judge Read stated that the majority took out of context a truncated comment in the Federal Reserve Board's commentary regarding the authority of a state to enforce such statutes. (42a-43a) She quoted the Commentary to demonstrate the majority's error:

> "[s]tate laws relating to *the terms of credit* required to be disclosed or the manner in which such terms are to be disclosed are preempted as to any credit or charge card application or solicitation that is subject to [15 USC § 1637[c]) . . . The preemption of such provisions of state law is *total*, and differs from other provisions of the TILA which generally preempt only inconsistent state laws" (54 Fed Reg at 13863) (emphases added).

(44a-45a) (ellipsis and emphasis in original). Judge Read stated that the majority "cannot evade preemption by portraying this enforcement action as a suit to enjoin a misleading and fraudulent 'overall impression' rather than 'inadequate disclosure.'" (45a)

> The only way for CCB to dispel the complained-about "overall impression"—the only way for CCB to comply with [the trial court's] injunction—is to revise and alter the form and content of its solicitations, i.e., to make different and/or additional disclosures. Neither the Attorney General nor the majority explains how else CCB may eliminate the alleged misrepresentations from its solicitations.

(45a-46a) (citations and footnote omitted).

IV. Statement of Facts

CCB is a Delaware bank that issues credit cards to consumers. CCB primarily issues credit cards to consumers who have no or poor credit histories. CCB is a state-chartered bank, subject to extensive regulation, supervision and examination by both the Federal Deposit Insurance Corporation and the Delaware Banking Commissioner.

In order to attract consumers and to inform them of its products, CCB sends out direct mail solicitations. It also communicates with consumers through the telephone and Internet. CCB periodically sends out hundreds of thousands of solicitations nationwide, including to consumers in New York. In these solicitations, CCB provides all the information required under TILA. It has never been disputed that CCB's solicitation materials and disclosures are truthful and accurate and comply with TILA's requirements and Regulation Z.

CCB's solicitations offered potential cardholders credit limits of "up to" $2,500 or, in some cases, "up to" $1,000. It is undisputed that CCB's solicitations never stated that a potential cardholder would receive a credit limit of $2,500 or $1,000. Since approximately November 2000, CCB's solicitations have disclosed the minimum as well as the maximum credit limit and, since June 2001, have generally disclosed the historical average of new credit lines as well. For instance, a CCB solicitation mailed in December 2001 contained the following disclosure:

> *You will receive a Visa Gold account with a minimum credit line of at least $350* if CCB can verify all information you provide, and you continue to meet our selection criteria and any other applicable criteria bearing on creditworthiness. *Your credit line (minimum $350, maximum $2,500) will be based on your creditworthiness. Initial credit lines have historically averaged approximately $400.* Over time your credit line may increase to $2,500 or higher based on payment history and other criteria bearing on creditworthiness. Our credit line increase programs may include offers that are subject to fees as well as merit increases.

(Emphasis added.)

CCB charges late payment fees and overlimit fees. The chart in each and every CCB solicitation labeled "TERMS AND CONDITIONS OF OFFER" discloses, among other things, the amount of the annual and origination fees and

the amount of the late and overlimit charges.[3] The chart is in the format dictated by TILA, and contains all the information mandated by TILA.

Upon issuance of a credit card, the cardholder receives the credit card attached to a piece of card stock. That document discloses in clear and readable type the precise credit limit, the annual fee, the account origination fee, the current APR and the current periodic rate. As of the time that it is received, the credit card is not active, and the cardholder must call an 800 number to activate it. Thus, if the cardholder decides that the terms described on the document to which the credit card is attached are unacceptable, the cardholder may reject them simply by choosing not to activate the card, and therefore will never incur any of the fees or expenses.

CCB offers a voluntary insurance program to its cardholders. In the event of a covered claim, that program makes the cardholder's minimum monthly payment or pays the account balance up to a certain dollar figure. The program is marketed nationwide, but the program in each state has varying requirements and limitations, consistent with each state's law. In New York, the program provides only death and dismemberment benefits, which are priced in accordance with New York insurance law. The New York Superintendent of Insurance specifically approved the prices and terms of these policies, as well as the certificates delivered to participating cardholders.

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[3] This chart (which is sometimes called the "Schumer Box") is required by Regulation Z. *See* 12 C.F.R. § 226.5a (2007).

Cardholders who enroll in the program in New York are charged a premium only for the benefits specifically available in New York and not for any of the benefits available only in other states. The mail solicitation specifically provides: "coverage and costs vary by state. See the enclosed insert for specific benefit terms and conditions." Immediately above the signature line that a cardholder must execute in order to receive the optional coverage, it states: "YES! Please enroll me in the optional CAP insurance program. I have read and understood the insurance and cost disclosures as described in the enclosed insert." The insert—entitled "Optional Benefit Programs"—explicitly provides under the heading "Credit Account Protector (CAP) Benefit Description" that certain benefits are not available in New York. When a cardholder enrolls in the program, a certificate is sent to the cardholder before any premium is charged. The certificate expressly provides, in bold print, that coverage is limited to life and dismemberment and that the cardholder may cancel the program and obtain a full refund in the event that the cardholder is dissatisfied with the coverage.

CCB also offers its customers optional membership in its Applied Advantage program. The Applied Advantage program over time has offered a number of benefits, including eligibility for a no-cost credit line increase and convenience checks. In order to enroll in the Applied Advantage program, a potential cardholder must affirmatively check a box on the Acceptance Certificate immediately next to a statement reading: "Check here if you wish to be enrolled in

Applied Advantage for the annual membership fee of $34.95. Your credit card acceptance will be processed even if you do not choose to accept Applied Advantage. See the enclosed insert for details."

V. The Attorney General's Claims against CCB

The Attorney General asserts that CCB violated Sections 349 and 350 of the General Business Law based on the alleged inadequacy of CCB's disclosures made pursuant to TILA's and Regulation Z's requirements. The Attorney General's Petition alleges, for example, that: "[CCB] fails to disclose to consumers that the exorbitant [account origination, annual and maintenance] fees charged to the account will leave many account holders with less than $150 in available credit" and that "the terms of the secured credit card agreement, including the high interest rate, $10 monthly maintenance fee, $50 annual fee, and $30 late and over-the-limit fees are inconspicuously buried on the fifth page of the advertisement and application in the 'Terms and Conditions' chart and not otherwise referred to in the advertisement and application."

The Petition further alleges inadequate disclosure of the terms of services offered by CCB in its credit card solicitations: "The [insurance] program's exclusions pertaining to New York consumers are not conspicuously disclosed, but rather are set forth in fine print on the last page of the application, and are difficult and confusing to read." "The 60-day cancellation provision, which enables consumers to avoid the automatic

renewal of their [Applied Advantage] membership, is not always clearly and conspicuously disclosed and often appears in miniscule print towards the end of the solicitation."

In an Affirmation filed in support of the Petition, the Assistant Attorney General similarly criticized CCB's disclosures for not containing sufficient information. In his Reply Affirmation, he stated that:

> [N]either the card carrier nor the cardholder agreement actually disclose that the consumer's credit limit will, upon activation of the account, be reduced by the amount of the Account Origination Fee and Annual Fee, or that most consumers will have less than $250 in available credit. Rather, the cardholder agreement merely states—in difficult to find or read small print size—that the $100 Account Origination Fee will be charged to the account in the same manner as any other finance charge, and that the $50 Annual Fee will be treated as a "purchase."

The trial court's discussion of the Attorney General's claims also focused on the insufficiency of CCB's disclosures. The trial court observed that the Attorney General "contends that CCB's credit card offers violate New York consumer protection laws because the qualification and disclaimer disclosures are not sufficiently prominent to avoid deceiving consumers." The trial court noted:

> [The Attorney General's] argument is that you disclose all this stuff, but the manner in which you disclose it, where you put pre-approved in big, bold letters and then up to $2500 credit line, more prominent but less bold letters, and somewhere in the back talk about other things, that that's deceptive and misleading to the average reasonable consumer. That's what he is contending. He is not contending that the TILA requirements aren't met here.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The Court of Appeals refused to follow the fundamental constitutional principle reaffirmed by this Court in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008). The Court of Appeals disregarded the plain language of Section 1610(e) of TILA, and effectively converted Section 1610(e) into a conflicts preemption clause (and thus totally redundant of Section 1610(a) of TILA). Contrary to the Court of Appeals' holding, when it enacted Section 1610(e), Congress expressly preempted the States' right to impose additional disclosure requirements for credit card solicitations. TILA's legislative history and the Federal Reserve Bank's interpretation confirm that the preemption mandated by Section 1610(e) is total.

Absent review by this Court, the Court of Appeals' decision will destroy the regulatory uniformity that Congress mandated in 1988 when it amended TILA and preempted all state laws

regarding the disclosures in credit card solicitations. If allowed to stand, the decision will enable the State of New York—and embolden the other States—to use the pretext of deceptive practices claims to balkanize the federal requirements governing the substance and manner of presentation of disclosures in credit card solicitations. Further, it will eviscerate the Federal Reserve Board's exclusive authority to determine what disclosures should (and should not) be made and how and in what form those disclosures should take.

In concluding her dissent, Judge Read stated: "In enacting Section 1610(e) Congress essentially decided that the benefits from a uniform, nationwide regime for disclosure under the aegis of the Board outweighed any loss of protection to consumers under state law. The Supremacy Clause permits Congress to make this judgment, and we are bound to honor it." (49a-50a). CCB's petition should be granted in order to prevent the harms that will be triggered from the Court of Appeals' failure to "honor" Congress' judgment.

POINT I

IN DEROGATION OF THIS COURT'S HOLDINGS, THE COURT OF APPEALS' DECISION FUNDAMENTALLY OVERRIDES AND NEGATES TILA'S TOTAL PREEMPTION OF STATE REGULATION OF CREDIT CARD SOLICITATION DISCLOSURES

The Court has clearly and frequently stated the constitutional principle that the States must

enforce the federal government's decision to occupy a field and to preempt state law. The most recent expression of that duty is *Riegel*.

The plaintiffs in *Riegel* claimed that a medical device was designed, labeled and manufactured in a manner that violated New York's common law, despite the fact that the device had been approved by the Food and Drug Administration (the "FDA"). *Id.* at 1005-06. The Court granted review to consider whether those claims were barred by the explicit preemption provision in the Medical Device Amendments of 1976 (the "MDA") to the federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k. The MDA expressly preempts state law requirements that (i) relate to health and safety and (ii) are "different from, or in addition to, any requirement applicable" under federal law. 21 U.S.C. § 360k(a)(1). The FDA regulation states that the MDA does not preempt "[s]tate or local requirements of general applicability." 21 C.F.R. § 808.1(d)(1) (2008). The plaintiffs in *Riegel* argued—as did the Attorney General in his *Riegel* amicus brief—that the FDA interpretive statement showed that those claims fell outside of the scope of the MDA's preemption provision. *Riegel*, 128 S. Ct. at 1010; Brief for the State of New York, *et al.* as Amici Curiae, No. 06-179, 2007 WL 2456949 at *7-8 (Aug. 27, 2007). This Court rejected that contention, and held that the MDA preempted these common law claims because they would effectively impose different or additional health and safety requirements. *Riegel*, 128 S. Ct. at 1011.

The Court's unambiguous application of the Supremacy Clause in *Riegel* should have lead the

Court of Appeals to hold that Section 1610(e) preempts the Attorney General's claims under Sections 349 and 350 of the General Business Law. Indeed, the preemption provision at issue in *Riegel* is not as broad as Section 1610(e), as it declares preemption of "only state requirements 'different from, or in addition to any requirement applicable . . . to the device under federal law." *See Riegel*, 128 S. Ct. at 1006 (quoting 21 U.S.C. § 360k(a)(1)). Section 1610(e) contains no such limitation—it provides for preemption of "any provision of the law of any State relating to the disclosure of information."

The Court of Appeals, however, affirmatively refused to follow the constitutional principles reaffirmed in *Riegel*. It justified its refusal by limiting the application of *Riegel* to just the facts arising under the MDA alone. (16a-17a) In her dissent, Judge Read highlighted the majority's fallacious reasoning and concluded that: "This is an even clearer case for preemption than *Riegel*." (47a) Judge Read stated:

> [T]he relief that the Attorney General sought (and has obtained) inevitably calls for CCB to alter the format and content of the disclosures in its credit or charge card solicitations of consumers *in New York*, thus "disrupt[ing] the federal scheme envisaged and designed by Congress to "enhance credit shopping" by requiring "more detailed and uniform" disclosure of credit information to consumers nationwide.

(48a-49a) (citing *Riegel*, 128 S. Ct at 1008) (emphasis in original). As Judge Read's analysis

makes plain, the majority's refusal to follow those principles and to enforce Section 1610(e) is a significant legal error that will have grave national consequences.

A. Congress Intended that TILA Totally Preempt State Law Regulation

The Court of Appeals incorrectly based its ruling on its view that there is a presumption against preemption. (16a-17a) In deciding whether state law is preempted by a federal statute, the Court's "sole task is to ascertain the intent of Congress." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987); *Rosario v. Diagonal Realty, LLC*, 8 N.Y.3d 755, 763 (2007), *cert. denied*, 128 S. Ct. 1069 (2008). " '[T]he purpose of Congress is the ultimate touchstone' " in any preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citations omitted). If a state action falls within the scope of an express preemption provision, it is barred, and there is no place for any "presumption", even in the context of consumer protection actions. *Rowe v. N.H. Motor Transportation Ass'n*, 128 S. Ct. 989, 998 (2008); *accord Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Congress enacted TILA in 1968. TILA's purpose is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a) (1976). TILA sets forth a variety of credit-related disclosure

requirements, which, pursuant to Congress' directive, have been implemented through "Regulation Z," 12 C.F.R. Pt. 226 (2008).

As originally enacted in 1968, TILA preempted only "inconsistent" state law, *i.e.*, it preempted only those state laws whose application would conflict with TILA's requirements. *See* 15 U.S.C. § 1610(a)(1). That preemption standard, echoed in a variety of other federal banking statutes, *e.g.*, 15 U.S.C. § 6807(a) (1999) (Gramm-Leach-Bliley Act of 1999), remains the general rule under TILA. However, as discussed below, a separate provision governing credit card solicitations was enacted in 1988.

In 1988, after a generation of experience with TILA and the development of a nationwide market for credit cards, Congress amended TILA by enacting the Fair Credit and Charge Card Disclosure Act ("FCCCDA"), Pub. L. No. 100-583, 102 Stat. 2960 (1988). The new provisions that the FCCCDA added to TILA require detailed and uniform disclosure of rates and other cost information in solicitations and applications for credit card and charge card accounts. These disclosure requirements pertain to both the substance and the manner of the disclosures. *See* 15 U.S.C. § 1632 (1988); 15 U.S.C. § 1637(c) (2005)

Congress' intent in imposing these standards was to enable consumers to understand the solicitations and to compare the terms of different credit card offers. Congress concluded that consumers could do so only if the disclosures in all credit card solicitations were uniform with respect to both the content covered and the manner of disclosure. As later stated by the Federal

Reserve Board when it amended Regulation Z to implement the FCCCDA, Congress intended that its 1988 amendments would ensure "detailed and *uniform* disclosure[s]" in such solicitations. Truth in Lending: Credit and Charge Card Disclosures, 54 Fed. Reg. 13,855, 13,855 (Apr. 6, 1989) (emphasis added).

Congress therefore enacted two related and reinforcing provisions designed to guarantee that there would be only a single and uniform set of federally imposed disclosure requirements. The first provision totally preempts state law relating to disclosure of information in a credit card solicitation or application. The second one grants exclusive regulatory authority to the Federal Reserve Board. The Court of Appeals refused to enforce these two provisions.

The FCCCDA added a new provision that expressly declares that TILA preempts all state regulation of disclosures in credit and charge card applications and solicitations. In contrast to TILA's general preemption rule in Section 1610(a)(1), this provision states:

> The provisions of subsection (c) of section 1632 of this title [which concerns the form of credit and charge card application disclosures] and subsections (c), (d), (e) and (f) of section 1637 of this title [which concerns the content of required credit and charge card application and annual fee renewal disclosures] shall *supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation* which is sub-

> ject to the requirements of section 1637(c) of this title or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

15 U.S.C. § 1610(e) (emphasis added).

Simultaneously, the FCCCDA conferred on the Federal Reserve Board the authority that Congress withdrew from the States, *i.e.*, the authority to dictate all disclosure requirements in connection with credit card solicitations. *Id.* § 1637(c)(5). The FCCCDA assigned the Federal Reserve Board the exclusive task of determining both the required content and format of such disclosures: "Information required by this subchapter shall be disclosed clearly and conspicuously, in accordance with the regulations of the Board." *Id.* § 1632(a).

When Congress gives a federal agency exclusive jurisdiction to regulate a particular field, state regulations may not intrude on the regulatory scheme established by Congress. *See, e.g.*, *California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 506-07 (1990) (California stream flow requirements preempted because they "interfere with [FERC's] comprehensive planning authority . . . ." (citations omitted)); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) ("When a state regulation 'affects the ability of [FERC] to regulate comprehensively . . . the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act' or presents

the 'prospect of interference with the federal regulatory power,' then the state law may be preempted even though 'collision between the state and federal regulation may not be an inevitable consequence.'" (quoting *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91-92 (1963))).

B. TILA Preempts the Entire Field of Credit Card Solicitation Disclosure Requirements

The Court of Appeals fundamentally misconstrued Section 1610(e) to limit its application to only state actions creating a conflict with TILA's substantive disclosure requirements, thus rendering it wholly redundant of Section 1610(a)(1).

Unlike Section 1610(a)(1), Section 1610(e) is not a "conflict" preemption clause. It expressly provides that TILA "supersedes *any provision* of the law of any State *relating to* the disclosure of information in any credit or charge card application or solicitation . . . ." 15 U.S.C. § 1610(e) (1994) (emphasis added). Similarly, Regulation Z reiterates the "Special rule for credit and charge cards" with respect to preemption:

> State law requirements *relating to the disclosure of credit information in any credit or charge card application or solicitation* that is subject to the requirements of section 127(c) of chapter 2 of the act (§ 226.5a of the regulation) . . . *are preempted*. State laws relating to the enforcement of section 127(c) and (d) are not preempted.

12 C.F.R. § 226.28(d) (2008) (emphasis added).

The Court of Appeals refused to abide by this Court's decisions that have repeatedly held that the phrase "relating to" in preemption clauses is to be given its broad meaning.

> For purposes of the present case, the key phrase, obviously, is "relating to." The ordinary meaning of these words is a broad one—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," Black's Law Dictionary 1158 (5th ed. 1979)—and the words thus express a broad pre-emptive purpose.

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992); *accord Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990); *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41, 47 (1987). Section 1610(e) must therefore be read to preempt all state laws and actions having "*a connection with, or reference to*" the disclosure of information in credit card solicitations. *See Rowe*, 128 S. Ct. at 995 (emphasis in original; quoting *Morales*, 504 U.S. at 384).

Regulation Z also makes clear that State laws, such as Sections 349 and 350 of the General Business Law, may be used in connection with credit card solicitation disclosures only to help enforce TILA's own requirements—but not to expand, supplement or modify TILA's requirements. As explained in the Federal Reserve Board's Official Staff Interpretations of Regulation Z (the "Commentary"):

> The standard that applies to preemption of state laws as they affect transactions of this type subject to §§ 226.5a and 226.9(e) *differs from the preemption standards generally applicable under the Truth in Lending Act*. The Fair Credit and Charge Card Disclosure Act [section 1610(e)] *fully preempts state laws relating to the disclosure of credit information in consumer credit or charge card applications or solicitations.*

12 C.F.R. pt. 226, Supp. I (2008) (emphasis added). In other words, any state law that either directly or indirectly has the effect of regulating such disclosures is of no force or effect. The Commentary dispositively illustrates the scope of preemption:

> For example, a state law requiring disclosure of credit terms in direct mail solicitations for consumer credit card accounts is preempted. A state law requiring disclosures in telephone applications for consumer credit card accounts also is preempted, even if it applies to applications initiated by the consumer rather than the issuer *because the state law relates to the disclosure of credit information in applications or solicitations within the general field of preemption, that is, consumer credit and charge cards.*

Id. (emphasis added).

The Court of Appeals misread the Commentary. According to the Court of Appeals, use of

state deceptive trade practices laws for any purpose is exempted from preemption under Section 1610(e). (10a) This reading, however, conflicts with the plain language of Section 1610(e), Regulation Z and the totality of the Commentary. Just before the passage on which the Court of Appeals relies (10a), the Commentary states that TILA "fully preempts state laws relating to the disclosure of credit information in consumer credit or charge card applications or solicitations." 12 C.F.R. Part 226, Supp. I at 493 (2007 ed.). The Commentary then observes: "For example, a state law requiring disclosure of credit terms in direct mail solicitations for consumer credit card accounts is preempted." *Id.* Likewise, the Federal Register Notice publishing the Commentary states: "State laws relating to the terms of credit required to be disclosed or the manner in which such terms must be disclosed are preempted as to any credit or charge card application or solicitation that is subject to 127(c) . . . . The preemption of such provisions of state law is *total* . . . ." Truth in Lending: Credit and Charge Card Disclosures, 54 Fed. Reg. 13855, 13863 (Apr. 6, 1989) (emphasis added). Just as was the case in *Riegel* with respect to the MDA, the Commentary interpreting TILA, when read in its plain context, confirms that use of state deceptive trade practices laws are preempted except when they are used solely to enforce the requirements imposed by TILA and Regulation Z. *See Riegel*, 128 S. Ct. at 1010-11.

The Court of Appeals also wrongly concluded that, when the Federal Reserve Board has not mandated a particular disclosure, the States to

are free to supplement TILA's requirements until such time as the Federal Reserve Board, in fact, does act. In her dissent, Judge Read identified the flaw in that reasoning:

> The majority's contrary statutory interpretation produces a patchwork scheme whereby each state may effect different or additional credit disclosures unless and until the Board acts pursuant to section 1637(c)(5) to regulate the form or substance of disclosure of the same item of credit information, which would perforce then become "information . . . which is subject to section 1637(c)." This, of course, completely undermines the uniformity of the federal regime that Congress devised to govern a nation-wide industry. Moreover, it leaves no room for the possibility that the Board may have policy reasons *not* to mandate a particular disclosure that a state considers to be warranted.

(39a-40a) (citing *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (footnote omitted, emphasis and ellipsis in original)).[4]

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[4] The Federal Reserve Board proved Judge Read's point and asserted its exclusive authority in the area in 2007 and 2008, when it proposed and adopted regulations requiring for the first time, on a prospective basis, disclosures of the very type that the Attorney General alleged that CCB had failed to make. *See* Truth in Lending, 72 Fed. Reg. 32948 (June 14, 2007); Truth in Lending, 73 Fed. Reg. 28866 (May 19, 2008).

POINT II

THE COURT OF APPEALS' DECISION WILL DESTROY THE NATIONAL UNIFORMITY ESTABLISHED BY TILA

The importance of uniform nationwide regulation in banking was highlighted by the Court in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007). Although *Watters* involved only national banks and their operating subsidiaries, the Court emphasized the principles underlying the long-standing history of preemption in the area of banking regulation. *Id.* at 1566-67 (discussing the benefits of exclusive federal regulation for the efficient exercise of bank powers). In *Watters*, those principles led to the conclusion that the state law was preempted, despite the lack of any express statutory provision addressing the particular preemption at issue. *Id.* at 1568-69. Here, since there is an express mandate that state law is preempted, that conclusion is even more compelling.

In the FCCCDA, Congress expressly preempted the entire field of state regulation of credit card solicitation disclosures. "Congress left no room for the States to supplement" TILA's requirements with respect to credit card solicitation disclosures. Thus, a State may not pursue an action for inadequate or insufficient disclosures, such as the Court of Appeals has allowed the Attorney General to do here. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Judge Read reviewed the cacophony of state regulation of credit card disclosures prior to the

enactment of the FCCDA in 1988, pointing out that at least eleven states had separately regulated the field. She noted: "This time, Congress tackled preemption head on, devising a 'special' rule for disclosure of credit information in credit or charge card applications or solicitations, which 'depart[ed] radically from' the inconsistency standard, 'the approach which Congress historically [had] adopted in the credit disclosure area.'" (37a) (citing Joseph W. Gelb & Peter N. Cubita, *The Fair Credit and Charge Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus. Law. 941, 955 (1988-1989)).

The legislative history of the FCCDA corroborates Judge Read's observations. Congress wanted to enable consumers to understand the solicitations that they receive and to be able to compare the terms of different credit card offers. Congress concluded that this objective could be achieved only if the disclosures were uniform with respect to both the content covered and the manner of disclosure.[5]

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[5] The House debate on the FCCCDA conference report leaves no doubt about Congress' belief that uniformity would contribute to the goal of consumer understanding. For example, Representative Barnard stated: "It is a bill requiring comprehensive fair, simple and uniform disclosure of the basic terms of credit cards . . . . If these terms are disclosed conspicuously in the same manner and location according to the type of application or solicitation, as provided by [this bill], then consumers can choose the card and combination of terms best for them." 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988). Similarly, Representative Hiler stated: "[The FCCCDA] adopts a single uniform federal standard that will greatly assist consumers in comparison shopping between credit card programs." *Id.*

Congress understood the necessity of the preemption provision in Section 1610(e) in order to effectuate its goal of national uniform regulation of the disclosure requirements. During the House debate, Representative Schumer explained its importance:

> The second issue on preemption is that credit cards, unlike mortgages, or auto loans, or home loans, are indeed a national industry. The large issuers control a lot of the market. If they are willing to go for tough disclosure, provided that they do not have to make different types of disclosure in each of the 50 States, that to me is a trade that benefits consumers, and it is a trade that ought to be made.

134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

The Court of Appeals' decision will destroy the uniformity established by Section 1610(e) and will reinstate the chaotic situation that existed before enactment of the FCCDA, when a regulation under TILA was protected only by the conflict preemption clause in Section 1610(a)(1). Indeed, the threat of multiple and different regulatory requirements in each of the fifty states will be unbridled. Virtually every state has a false and deceptive practices statute similar to Section 349 and 350 of the General Business Law.[6] Absent this Court's intervention, the

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[6] More than 80 percent of the States have such laws. *See* Jonathan A. Sheldon, *Unfair and Deceptive Acts and Practices*, App. A (6th ed. 2004).

States will be empowered to challenge the adequacy of the form and manner of the disclosures required under Regulation Z and to impose their own supplemental and inconsistent requirements.

The Court of Appeals' decision establishes the foundation for a completely balkanized system of regulation, thereby undermining the very benefits provided to consumers of a nationwide uniform system of disclosures and subjecting financial institutions to inconsistent and multiple burdens depending on the State to which the credit card solicitations are being mailed. The whole purpose of preemption, particularly in light of the history underlying the enactment of Section 1610(e), is to prevent those adverse consequences. *See State Farm Bank, FSB v. Reardon*, 539 F.3d 336, 348 (6th Cir. 2008) ("Were this Court to agree with the Superintendent that the Ohio Act may be applied to State Farm Bank exclusive agents, we would be opening the door to subjecting State Farm Bank and its exclusive agents to fifty separate and distinct licensing and regulatory schemes, all with their own requirements and procedural hurdles. Subjecting State Farm Bank and its exclusive agents to such a veritable 'hodgepodge' of state regulation would not only be unduly burdensome, it would also be at odds with the very purpose behind federal regulation of federal savings associations.").

CCB's petition should be granted in order to enforce the plain language of Section 1610(e) preempting all state regulation of credit card solicitation disclosures and to prevent the destruction

of a national uniform system that Congress deliberately created.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Dated: September 23, 2008

Respectfully submitted,

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APPENDIX

Nos. 3, 96

IN THE MATTER OF THE PEOPLE OF THE STATE OF NEW YORK, BY ELIOT SPITZER, AS ATTORNEY GENERAL,

Respondent-Appellant,

—v.—

APPLIED CARD SYSTEMS, INC., *et al.*,

Appellants-Respondents.

H. Peter Haveles, Jr., for *appellants-respondents*.
Michelle Aronowitz, for *respondent-appellant*.
Attorney General of the State of Vermont, et al., *amici curiae*.

CIPARICK, J.:

This appeal arises out of a special proceeding initiated by the Attorney General, seeking restitution, civil penalties, and injunctive relief for violations of New York's Executive Law and Consumer Protection Act (*see* Executive Law § 63 (12), General Business Law §§ 349, 350). We are asked to determine whether the federal Truth-in-Lending Act (TILA) preempts these claims of a fraudulent and deceptive credit card solicitation scheme. We conclude that it does not. We hold, however, that res judicata effect should be

granted to a prior nationwide class action settlement agreement, thereby precluding the Attorney General from recovering certain restitution.

I.

Respondent Cross Country Bank (CCB) is a Delaware Bank that, since 1997, has actively solicited consumers in the "sub-prime" credit market to apply for its credit cards. These consumers "generally would not qualify for credit under traditional underwriting guidelines and principles."[1] Certain of CCB's marketing materials claim that the company's "purpose is to help people establish good credit." Respondent Applied Card Systems (ACS) provided, as relevant here, debt collection services for CCB's credit card accounts.

On March 28, 2003, the Attorney General filed a Verified Petition asserting that CCB's credit card solicitations and collections practices violated New York's Executive Law and Consumer Protection Act (*see* Executive Law § 63 [12] [fraud], General Business Law §§ 349 [deceptive business practices] and 350 [false advertising]). The gravamen of the petitioner's complaint was that CCB had misrepresented the credit limits that sub-prime consumers could obtain and that it failed to disclose the effect that its origination and annual fees would have on the amount of initially available credit.

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[1] CCB also solicits consumers who have yet to establish a credit history.

For example, in its mail solicitations CCB told consumers that they were "pre-approved" for a credit limit "up to" $2,500 or $1,000. These communications further clarified that the actually-approved credit limit could be substantially less, perhaps as low as $350.[2] CCB's solicitations also explained that upon approval consumers would incur an $100 "Account Origination Fee" and a $50 "Annual Fee." But CCB's explanation of the fact that those fees would be treated as charges that could greatly reduce the amount of credit initially available to consumers were oblique.[3] In some cases, the initial fees depleted consumers' credit limits by approximately 40% or more.

As relevant here, the Verified Petition also contained allegations of fraud and deception pertaining to CCB's marketing of "secured cards," the Credit Account Protector (CAP) insurance program, the Applied Advantage (AA) cardholder benefit program, and a debt collection device known as "re-aging." With respect to secured

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[2] In some of its solicitations, CCB also explained that "historically," the average approved credit limit was $400.

[3] For example, in one of its mail solicitations, CCB described the origination fee as a "one-time" charge. Further, near the bottom of the first page of CCB's "Credit Card Agreement," the company stated:

> "**Our Charges**. You agree to pay us the following fees in connection with your Account. Such fees will be treated as Purchases on your Account . . .
>
> **1. Annual Fee.** Your account is subject to an Annual Fee and it will be imposed when your Account is approved and in the same billing cycle each following year."

cards,[4] petitioner asserted that CCB's advertisement was deceptive because its banner touted "no late fees*" and "no collections calls*," but further clarified that such fees would be imposed and such calls made in certain instances. The marketing of CAP was fraudulent and deceptive, petitioner claimed, because the program was advertised as providing coverage in the event of "death, disability, unemployment, or family leave," but—as CCB clarified in an insert and subsequently-mailed certificate of coverage—only life and dismemberment benefits were available to New York consumers.[5] As for AA, petitioner asserted that CCB's practice of automatically enrolling consumers in the benefit program—at a cost of $34.95 per year—unless they expressly opted-out of it was deceptive because the opt-out mechanism was confusing and misleading. Finally, petitioner alleged that ACS marketed re-aging as a means for severely delinquent cardholders to bring their accounts current through a series of payments, while failing to explain that

[4] Such cards were "secured" by funds on deposit in savings accounts maintained by CCB. Secured cards' credit limits corresponded to the amount of funds on deposit in those accounts. According to the Verified Petition, those limits were reduced by a $50 account origination fee and a $10 monthly maintenance fee. And, like its other credit cards, CCB's secured cards were subject to monthly $30 late and over-the-limit fees.

[5] Petitioner further claimed that CCB's solicitations deceptively positioned the CAP authorization signature line in close proximity to the line that consumers were required to sign to accept CCB's credit card offer.

over-the-limit fees would continue to accrue throughout the re-aging process and that both these fees and the previously imposed late fees would be due at the conclusion of the re-aging process.[6]

In addition to the alleged fraudulent and deceptive practices described above, the Verified Petition also set forth certain facts regarding respondents' late fees, finance charges, balance calculation method, and the lack of any "grace period" for consumer payments. Pursuant to TILA, these terms must be disclosed in all credit card solicitations. But petitioner claimed that many consumers were "unaware" of the manner in which charges and penalties based upon the terms were assessed to their accounts.[7] According to petitioner, these charges and penalties contributed to "trapp[ing] . . . unwary consumers" in a "vicious cycle of pyramiding debt."

On February 11, 2004, Supreme Court issued a Decision and Order that, in relevant part, held that petitioner was barred by res judicata from seeking restitution for pre-January 1, 2002 "front-end claims," or those concerning illegal conduct "at or near the inception of the card-

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[6] Re-aging refers to a federally-regulated process through which credit card companies enter into agreements with delinquent card holders to avoid "charging-off" such accounts due to persistent non-payment (*see* 65 Fed Reg 36903, 36903 [2000]).

[7] With respect to CCB's secured card advertisement, petitioner asserted that the late and over-the-limit fee information was "buried" in the application and its Terms and Conditions chart.

holder relationship," on behalf of New York consumers who had opted to accept the benefits of a nationwide class action settlement with CCB.[8] The California Superior Court approved the settlement and dismissal of the action with prejudice on September 30, 2002 (*see Allec v Cross Country Bank*, No. 802894, Final Judgment and Order of Dismissal with Prejudice [Sept. 30, 2002]).

In their motion to reargue the February 11 Order, respondents asserted that the credit card application and solicitation disclosure requirements set forth in TILA (*see* 15 USC §§ 1632 [c], 1637 [c], [e], [f]) and its accompanying regulation, Regulation Z (12 CFR Part 226), preempted petitioner's claims. Following oral argument, Supreme Court held that the claims were not preempted.

After issuing its preemption decision, the court proceeded to find "as a matter of law and fact" that CCB had "repeatedly and persistently" engaged in fraud, deception and false advertising in connection with its credit card solicitations, and that ACS's marketing of the re-aging process was similarly illegal. These rulings were based on the court's review of "volumes of evidentiary proof," including more than 100 pages of application and solicitation materials, more than 200 consumer complaints and affidavits, and the affidavits of former ACS collection employees.

On June 24, 2004, Supreme Court issued an Order that, as relevant here, "permanently enjoined"

[8] Of the New York members of the *Allec* class, only 12 chose not to accept the settlement's benefits.

respondents from engaging in future fraud, deception, and false advertising with respect to: credit limits, initially-available credit, late fees and collection calls concerning secured credit card accounts, benefits available under CAP, and the benefits of account repayment plans, such as re-aging. Supreme Court also prohibited respondents from automatically enrolling consumers in AA without express authorization. The Appellate Division affirmed, rejecting respondents' preemption argument (*see* 27 AD3d 104, 109 [2005]). On January 19, 2006, Supreme Court entered an Order awarding the Attorney General approximately $1.3 million in restitution and damages, $7.9 million in penalties and $2,000 in costs. In part, restitution was based upon costs incurred by virtue of the origination and annual fees as well as certain late and over-the-limit fees.

The Appellate Division modified. Upholding Supreme Court's res judicata ruling, the court held that the "public interest does not justify giving New York consumers bound by the *Allec* settlement two chances to receive make-whole relief" (41 AD3d 4, 8 [2007] [internal quotation and alteration omitted]). As to respondents' appeal, the court held that Supreme Court's award of restitution for petitioner's CAP and re-aging claims was improper. Finally, the court affirmed each of the penalties assessed.

This Court granted respondents leave to appeal and we now affirm.

II.

Under the U.S. Constitution's Supremacy Clause (U.S. Const. art. VI, cl. 2.), the purpose of our preemption analysis is singular and straightforward. "[O]ur sole task is to ascertain the intent of Congress" (*Cal. Sav. & Loan Ass'n v Guerra*, 479 US 272, 280 [1987]; *Rosario v Diagonal Realty LLC*, 8 NY3d 755, 763 [2007]; *see also Medtronic, Inc. v Lohr*, 518 US 470, 485 [1996] ["[T]he purpose of Congress is the ultimate touch-stone in every pre-emption case"] [internal quotation omitted]). Preemption can arise by: (i) express statutory provision, (ii) implication, or (iii) an irreconcilable conflict between federal and state law (*see Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006]).

When dealing with an express preemption provision, as we do here, it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption (*see Cipollone v Liggett Group*, 505 US 504, 517 [1992] [majority op] [statute's preemptive scope is "governed entirely" by its "express language"]). Instead, the resolution in this case turns solely upon proper statutory construction of TILA's credit card application and solicitation preemption provision (*see Matter of Frew Run Gravel Prods. v Town of Carroll*, 71 NY2d 126, 131 [1987]). In undertaking that task, we are guided by the "starting presumption that Congress does not intend to supplant state law" unless its intent to do so is "clear and manifest" (*New York State Conf. of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645,

654 [1995]; *Lohr*, 518 US at 485; *accord Balbuena*, 6 NY3d at 356).

The preemption provision at issue here was enacted as part of the Fair Credit and Charge Card Disclosure Act of 1988 (FCCCDA), which amended TILA.[9] It states:

> **"(e) Certain credit and charge card application and solicitation disclosure provisions**
>
> The provisions of subsection (c) of section 1632 of this title and subsections (c), (d), (e), and (f) of section 1637 of this title shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c) of this title or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections" (15 USC § 1610 [e]).

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[9] Since its enactment in 1968, TILA has also contained another preemption provision (*see* 15 USC § 1610 [a] [1]). In contrast to 15 USC § 1610 (e), that provision preempts state laws "relating to the disclosure of information in connection with credit transactions," only to the extent of their inconsistency with TILA or Regulation Z (*see* 15 USC § 1610 [a] [1]; *see also* Clontz & Pannabecker, Truth-In-Lending Manual: Text and Forms ¶ 2.03 [4] [2007 ed]).

Respondents repeatedly assert that section 1610 (e) expressly preempts "any and every state law 'relating to the disclosure of information in any credit or charge card application or solicitation.'" Petitioner counters that its claims are not preempted because they do not relate to the disclosure of credit information, but rather to affirmative deception. Based upon the statutory text, legislative history, and administrative interpretation of section 1610 (e), we agree with petitioner.

Section 1610 (e) does not preempt every state law that could potentially touch upon any credit information that respondents might choose to include in their credit card applications and solicitations. Instead it preempts those state laws that relate to "disclosure of information," in credit card applications and solicitations "subject to the requirements of section 1637(c)," not those that prevent fraud, deception and false advertising. Preemption is limited, then, to laws that purport to alter the format, content, and manner of the TILA-required disclosures and those that require credit issuers to affirmatively disclose specific credit term information not embraced by TILA or Regulation Z (*see* 15 USC §§ 1610 [e], 1637 [c] [5], *see also* 54 Fed Reg 13855, 13863 ["State laws relating to the terms of credit required to be disclosed or the manner in which such terms must be disclosed are preempted"]; 12 CFR Part 226, Supp I, 28 (d) (1) [Jan. 14, 2008] [explaining that state laws are preempted when they require the disclosure of credit terms]).

Neither aspect of such preemption is present in this case. This is because New York's Executive

Law and Consumer Practice Act, collectively, do not require respondents to disclose anything. These statutes simply require that they refrain from fraud, deception, and false advertising when communicating with New York consumers.

The misleading statements in respondents' applications and solicitations regarding potential credit limits, initially-available credit, secured card benefits, credit insurance coverage, re-aging benefits, and their deceptive automatic enrollment of consumers in the AA program do not constitute the disclosure of any information "which is subject to the requirements of 1637(c)" (*see* 15 USC 1610 [e]).[10] The only information in a credit card application or solicitation that must be disclosed pursuant to section 1637 (c) is that

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[10] Petitioner's claims also do not concern the tabular format of certain TILA disclosures, disclosures in renewal notices, disclosures of percentages used to determine fees, or the disclosure of the range of fees applicable in different states. Accordingly, these claims do not implicate section 1632 (c) or subsections (d), (e), or (f) of section 1637, which are referenced at the beginning of the preemption clause at issue here (*see* 15 USC §§ 1632 [c] [1] [requiring presentation of "the information described in paragraphs (1)(A), (3)(B)(i)(I), (4)(A), and (4)(C)(i)(I) of section 1637 (c)" to be set forth in a tabular format, commonly known as the "Schumer Box" after FCCCDA's House-sponsor, then-Representative Charles Schumer (N.Y.), 15 USC § 1637 [d] [1] [B] [requiring disclosure in renewal statement of "the information described in subsection (c)(1)(A) or (c)(4)(A)"], 1637 [e] [requiring disclosure of percentage and amount used to determine "any fee required to be disclosed under subsection (c) or (d)"], 1637 [f] [permitting disclosure of range of fees "required to be disclosed . . . under [certain subparagraphs] of subsection (c)"]).

describing: (i) annual percentage rate, including whether such rate is variable (ii) annual and other periodic fees, including, "membership fees imposed for the issuance or availability of a credit card," (iii) minimum finance and transaction charges, (iv) grace period, (v) balance calculation method, (vi) cash advance fee, (vii) late fee, (viii) over-the-limit fee, and (ix) a statement that charges incurred are due when a periodic statement is received (*see* 15 USC § 1637 [c] [1] [A] [I] - [B] [iii]; 15 USC § 1637 [c] [2] [mandating, with certain exceptions, disclosure of information described in 1637 (c) (1) (A), in telephone solicitations]; 12 CFR § 226.5a [b]). Pursuant to 15 USC § 1637 (c) (5), however, the Federal Reserve Board of Governors (the Board) has authority to enact regulations requiring "the disclosure of information in addition to" that described in section 1637 (c).

The Verified Petition does make reference to the fact that many consumers were "unaware" of the manner in which certain credit terms, including late and over-the-limit fees, balance calculation method, and the lack of any grace period, were applied against their accounts. But petitioner "takes no issue" with the substance or sufficiency of respondents' TILA disclosures and he has obtained no relief based upon consumers' purported lack of awareness. As we previously have held, the mere fact that a complaint makes reference to certain matters that are preempted by a federal statute does not "transform" a state law action into one that is preempted under fed-

eral law (*see Nealy v US Healthcare HMO*, 93 NY2d 209, 220-221 [1999]).[11]

Respondents argue, however, that the statutory text compels us to conclude that section 1610 (e) bars the Attorney General's claims. Their textual argument is based primarily upon the purportedly settled construction of the phrase "relating to" in U.S. Supreme Court precedent.

The U.S. Supreme Court's interpretation of the phrase "relating to," does not help respondents. When construing other statutes, the Court has concluded that the phrase has a meaning that "express[es] a broad pre-emptive purpose" (*see Morales v Trans World Airlines, Inc.*, 504 US 374, 383 [1992]; *accord Rowe v N.H. Motor Transp. Assn.*, ___ US ___, 128 S Ct 989, 994 [2008]). It has been defined as "having a connection with, or reference to" the subject-matter set forth in a particular preemption clause (*see Morales*, 504 US at 384). But the Court has made clear that the scope of its interpretation of "relating to" is subject to some limitation. This is because "[i]f 'relate to' were taken to extend to the furthest stretch of indeterminancy, then for all practical purposes pre-emption would never run its course" (*Travelers*, 514 US at 655). Thus, the U.S. Supreme Court has "cautioned against an 'uncritical literalism' that would make pre-

[11] This case does not present the question whether a New York Executive Law or Consumer Protection Act claim seeking relief based upon specific 1637 (c) disclosures would be preempted. Accordingly, we offer no opinion upon the propriety of such a claim.

emption turn on 'infinite connections' " (*Egelhoff v Egelhoff*, 532 US 141, 147 [2001], *quoting Travelers*, 514 US at 656).

We applied these principles in *Nealy* to conclude that even when a complaint refers to matters preempted under federal law, no preemption occurs if the effect of the relief sought upon the federal scheme is " 'too tenuous, remote or peripheral' " (*Nealy*, 93 NY2d at 220, *quoting Shaw v Delta Air Lines, Inc.*, 463 US 85, 100 n 21 [1983]). We hold this rule of limitation to be applicable here. Quite simply, petitioner's claims do not relate to the disclosure of federally-mandated information in credit card applications or solicitations. Instead, they relate to the inclusion in those materials of certain fraudulent and deceptive misinformation—none of which is even addressed by the federal disclosure scheme.

The preemption clause at issue here is very different from that in *Morales*, a case that respondents' textual argument hinges upon. There, the Airline Deregulation Act of 1978 (ADA) preempted "any law 'relating to rates, routes, or services' of any air carrier' " (*Morales*, 504 US at 378-379 [quoting 49 USC § 1305 [a] [1]). Based on the comprehensive preemptive intent evidenced in this provision, the Court had little trouble concluding that a set of purportedly enforceable guidelines adopted by the National Association of Attorneys General, which described in excruciating detail the "content and format" of airline advertising, frequent flyer programs, and passenger compensation policies, was preempted (*see Morales*, 504 US at 388, 390-414; *see also Am. Airlines v Wolens*, 513 US 219, 227-228 [1995]

[preemptive provision in ADA bars claims under Illinois's Consumer Fraud Act]; *Air Transp. Assoc. of Am., Inc. v Cuomo*, 520 F3d 218, 223 [2d Cir 2008] [ADA preempts New York's Passenger Bill of Rights because that statute requires airlines to provide certain amenities to travelers and therefore relates to "the service of an air carrier"]). But the reach of section 1610 (e) is not as expansive as that of the ADA preemption provision at issue in *Morales*.

Section 1610 (e) preempts only those state laws that relate to the format, content, manner, or substance of the TILA-required disclosures. Thus, there is no preemption here because neither petitioner's claims nor the relief it was granted below have any effect upon those disclosures (*see Nealy*, 93 NY2d at 220 [no preemption where "[p]laintiff's claims do not bind an employee plan to any particular choice of benefits, do not dictate the administration of such a plan and do not interfere with a uniform administrative scheme"]; *see also Harvey v Members Empls. Trust for Retail Outlets*, 96 NY2d 99, 106 [2001] [state insurance law and regulation relate to an ERISA plan because they "impose a basic benefit structure"]). To the contrary, Supreme Court's affirmed Orders did not mandate any alteration of or addition to the required section 1637 (c) disclosures. Rather, its injunction simply prevents respondents from affirmatively misrepresenting the nature of credit terms that, at present, are not even subject to regulation under TILA or Regulation Z. Indeed, petitioner's entitlement to the relief granted below exists wholly apart from respondents' section 1637 (c) disclo-

sure obligations; it is based upon "a more general obligation—the duty not to deceive" (*see Cipollone*, 505 US at 528-529 [plurality opinion]).

But respondents maintain that Congress's intent to create a uniform system of disclosure in credit card applications and solicitations militates in favor of preemption. We again emphasize, however, that petitioner's success in this case does not force respondents to make any alterations to their section 1637 (c) disclosures or to affirmatively disclose any additional credit terms. This is dispositive. In any event, the sort of "indirect economic influence" upon respondents' solicitations practices resulting from the relief accorded below is not sufficient to overcome the presumption against preemption of state law (*see Travelers*, 514 US at 664 [although ERISA contains a broad, "relating to," preemption clause New York law imposing surcharges on all insurers was not preempted because the law "d[id] not impose [a] . . . substantive coverage requirement"]; *accord Nealy*, 93 NY2d at 220).

We acknowledge that the U.S. Supreme Court recently reiterated that state tort judgments impose substantive requirements that "can be . . . a potent method of governing conduct and controlling policy" (*see Riegel v Medtronic, Inc.*, 552 US ___, 128 S Ct 999, 1008 [2008] [internal quotation omitted]). But *Reigel* is not controlling here for two reasons. First, the Medical Device Act preemption provision at issue there is substantively different from 15 USC § 1610 (e). It preempted "state requirements different from, or in addition to, any requirement applicable to . . . [a medical] device under federal law" (*see id.* at

1006, *quoting* 42 USC § 360k (a) (1)]). The scope of section 1610 (e) preemption is, however, expressly limited to state laws relating to the disclosures specifically required under section 1637 (c), it does not extend to the additional state requirement that respondent must refrain from fraud and deception when making statements about credit terms that are not even within the scope of TILA or Regulation Z.

Second, unlike the tort law claims in *Reigel*, the Attorney General's success in this action will not "disrupt[ ] the federal scheme" of disclosure mandated under TILA (*see* 128 S Ct at 1008). Petitioner has not sought relief based upon the TILA-required disclosures. Nor has he sought to alter the format, content, or manner of those disclosures. The relief granted below does not impose any additional disclosure requirements upon respondents, it merely precludes them from making fraudulent and deceptive statements regarding certain credit terms (*compare Riegel*, 128 S Ct at 1008 [state tort law claim preempted because FDA's exacting standards for pre-market approval of medical devices would be disrupted by judgment "that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved"]).

Respondents' disruption argument assumes that Congress intended the TILA disclosures to provide consumers' sole protection against credit card companies' fraudulent and deceptive marketing practices. But the qualified nature of the preemption provision's text belies that sweeping assertion, as does the statute's legislative history.

The FCCCDA's House Conference Report states that section 1610 (e) preempts "State credit and charge card disclosure laws" (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 22, reprinted in 1988 US Code Cong & Admin News, at 3960). An example of such a law is California's Areias Credit Card Full Disclosure Act of 1986, which contains application and solicitation disclosure requirements very similar to TILA's (*see* Cal. Civ. Code §§ 1748.10-.12; Furletti, Comment, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 Temp. L. Rev. 425, 451 & n 233 [2004]; *see also* Wis. Stat. Ann. § 422.308 [requiring that "every application for an open end credit plan" shall set forth certain specific information, including "the annual percentage rate"]).[12] Although the Senate's version of FCCCDA would have saved provisions of such state laws that required disclosure of information in addition to that set forth in section 1637 (c) from preemption if they were reenacted within two years of the Act's passage (*see* S Rep No. 100-259, 100th Cong, 1st Sess, at 9-10, reprinted in 1987 US Code Cong & Admin News, at 3945-3946), the Senate compromised and "recede[d]" to the House version, which "preempted the provisions of all

[12] Like TILA, these state credit card application and solicitation laws mandated disclosure of only "selected costs associated with credit cards" (*see* Gelb and Cubita, *The Fair Credit Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus Law 941 n 1 [1988-1989] [quoting Act of Sept. 29, 1986, ch. 1397, § 1(a), reprinted in Cal. Civ. Code § 1748.10 historical note (West 1989)]).

state laws *with respect to the disclosures mandated under its bill*" (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 21, reprinted in 1988 US Code Cong & Admin News, at 3960 [emphasis added]; *see also* Gelb and Cubita, *Credit Card Application and Solicitation Disclosure Legislation: An Alternative to the Rate Ceiling Approach*, 43 Bus Law 1557, 1564 [1988]). The Attorney General's claims in this case do not effect any of the mandated disclosures ultimately codified by the FCCCDA nor do they require respondents to make any additional affirmative disclosures regarding their credit products. Thus, this case does not concern the sort of credit card disclosure laws preempted under TILA.

Congress also made clear that, even when enforcing the TILA disclosure requirements, states could use their unfair and deceptive trade practices acts to "requir[e] or obtain[] the requirements of a specific disclosure beyond those specified in Section [1637] (c) in the settlement or adjudication of a specific case or cases" (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 22, reprinted in 1988 US Code Cong & Admin News, at 3960).[13] In sum, the legislative record shows that Congress only

[13] The Conference Report's approval of the prospect of settlements and adjudications by which state agencies would gain the right to demand disclosures beyond those required under section 1637 (c) stands in marked contrast to the dissent's claim that Congress "wanted to cut off and fully supplant" all state regulation of credit card applications and solicitations (*see* dissenting op at 18).

intended FCCCDA to preempt a specific set of state credit card disclosure laws, not states' general unfair trade practices acts.

Even more significantly, the Senate Banking Committee Report states that TILA does not preempt "the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices" (*see* S Rep No. 100-259, 100th Cong, 1st Sess, at 9, reprinted in 1987 US Code Cong & Admin News, at 3945). General Business Law §§ 349 and 350 comprise, of course, just such a "mini-FTC" act (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]; *Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 323-324 [2002]). The Senate Report's understanding of TILA's disclosure requirements is reflected in the Official Commentary of Federal Reserve Board of Governors, the agency charged by statute with administering TILA (*see* 12 CFR Pt 226, Supp I, 28 (d) (3) [Jan. 14, 2008] ["[S]tate laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted"]; 54 Fed Reg 13855, 13864 [1989] ["[A]ny prohibitions against unfair and deceptive acts or practices (such as state 'mini-FTC acts') . . . are not preempted"]). That interpretation is entitled to great deference (*see Ford Motor Credit Co. v Milhollin*, 444 US 555, 565 [1980] ["[D]eference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational, Federal Reserve Board staff opinions

construing the Act or Regulation should be dispositive"]).[14]

[14] That the Board has recently proposed certain amendments to Regulation Z that would require credit card issuers to disclose in their applications or solicitations the effect of "fees or a security deposit" upon an applicant's credit limit, if such fees "are 25 percent or more of the minimum credit limit offered for the account" (*see* 72 Fed Reg 32948, 32954 [June 14, 2007]; *see also* 73 Fed Reg 28866, 28890 [May 19, 2008] [proposing disclosure of effect of fees or security deposit in "initial disclosure", or account opening, statements]) does not alter our conclusion. After all, "[t]he proposal of regulations is not synonymous with [their] adoption" (*see State by Malone v Burlington N., Inc.*, 311 Minn 89, 92, 247 NW2d 54, 55 [Minn 1976]).

Moreover, the Board, the Office of Thrift Supervision, and the National Credit Union Administration, pursuant to their authority under the Federal Trade Commission Act, have also recently proposed Regulation AA, a provision of which would prohibit charging fees and security deposits that constitute a majority of a consumer's credit limit during the first 12 months of the account and would also require credit issuers to spread the cost of fees totaling more than 25 percent of a consumer's credit limit equally over the course of the year (*see* 73 Fed Reg 28904, 28923-28925 [May 19, 2008]). The agencies' rationale for adopting proposed Regulation AA is that the practice of charging fees that quickly deplete a new customer's credit limit "appears to be an unfair act or practice" under the Federal Trade Commission Act, the very statute General Business Law §§ 349 and 350 were modeled upon (*id.* at 28,924). And to support their conclusion that consumers "may lack the information necessary to avoid harm" from this practice, the agencies cite to the Appellate Division's initial decision in the instant case (*see id.* at 28924 & n 60 [quoting Appellate Division's conclusion (*see* 27 AD3d at 108) that CCB's post-2001 solicitations " 'did not represent an accurate estimation of a consumer's credit limit' "]). Thus, from these recent regulatory proposals, we

Therefore, we hold that petitioner's Executive Law and Consumer Protection Act claims are not preempted by TILA or Regulation Z.

III.

We turn next to the res judicata effect of the *Allec* settlement upon a portion of the Attorney General's claims for restitution. Pursuant to California's procedural rules (Cal. Rules of Court 3.769 [f]), New York consumers were provided with notice of the settlement and the opportunity to "opt-in" to a nationwide settlement class. In exchange for certain payments or account credits, consumers who opted-in:

> "forever released and discharged [respondents] from any claims . . . of any nature . . . that [they] have had in the past or now have against respondents, which relate to the solicitation or origination of the cardholder relationship, the 'pre-approval' or persons being solicited for CCB credit cards, the Initial Credit Card Fees, the assignment of credit limits and/or Disclosure Claims; and all claims set forth in the [*Allec*] action"

The California court approved the settlement. And the parties do not dispute that the *Allec* action was dismissed with prejudice, thereby "forever barr[ing]" all settlement class members

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can infer that TILA and Regulation Z have not previously embraced the regulation of credit limit practices that were determined to be deceptive below.

from prosecuting the released claims against respondents. Under California law, such a finally-approved settlement is entitled to res judicata effect (*see e.g., Johnson v Am. Airlines, Inc.*, 157 Cal App 3d 427, 431, 203 Cal Rptr 638, 640 [1984]; *see also* Moore & Thomas, Cal Civ Prac Proc § 32:17 [2008 ed] ["A judgment rendered in a proper class action is res judicata as to the claims of every member of the class although they are not formal parties to the suit"]).[15]

In New York, res judicata, or claim preclusion, bars successive litigation based upon the "same transaction or series of connected transactions" (*see* Siegel, NY Prac § 447 [4th ed]) if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]; Weinstein-Korn-Miller, NY Civ Prac ¶ 5011.08 [2d ed]). Here, the parties' dispute focuses solely upon the second prong of the res judicata test, privity.

The Attorney General argues that he is not in privity with members of the *Allec* settlement class because his interest in seeking restitution

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[15] The California court's September 30 Order states that "[a]s of Final Approval, the Action is . . . dismissed with prejudice." No order granting final approval (*see* Cal. Rules of Court 3.769 [h] [providing for entry of judgment "after the final approval hearing"]), however, appears in the record. Nevertheless, neither party disputes Supreme Court's statement that "there is no question that the *Allec* class action was dismissed with prejudice on the merits" pursuant to the *Allec* settlement.

on those consumers' behalf is far broader than their individual pecuniary concerns. Rather, he seeks restitution as a means of deterring future fraud, deception, and false advertising and restoring the public's trust in the consumer credit marketplace. Amici, the Attorneys General of 30 states, agree with that view and urge us to consider the problem of "class action abuse," which, they say, has led to collusive and undervalued settlements such as that entered in *Allec*. Respondents counter by invoking our traditional solicitude towards settlement agreements, urging us to permit the *Allec* settlement class members only one opportunity to obtain make-whole relief. We agree with respondents.

Our precedents have repeatedly explained that privity is not susceptible to a hard-and-fast definition (*see Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970] ["[T]he term privity does not have a technical and well-defined meaning"]; *Gramatan*, 46 NY2d at 485 ["[P]rivity is an amorphous term not susceptible to ease of application"]; *Buechel v Bain*, 97 NY2d 295, 304-305 [2001] ["[P]rivity is " 'an amorphous concept' "]). Although we have provided examples of cases in which privity is present (*see Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]; *see also Buechel*, 97 NY2d at 305) none of those are applicable here. Ultimately, we must determine whether the severe consequences of preclusion flowing from a finding of privity strike a fair result under the circumstances (*see Buechel*, 97 NY2d at 304). This inquiry is, of course, informed by reference to the policies that res judicata is

designed to protect (*see Reilly v Reid*, 45 NY2d 24, 28 [1978]).

It is a " 'familiar doctrine' " that a class action judgment is binding upon class members who were adequately represented in the action (*see Richards v Jefferson County, Alabama*, 517 US 793, 800-801 [1996], *quoting Hansberry v Lee*, 311 US 32, 42-43 [1940]; *see also Taylor v Sturgell*, 552 US ___, 2008 US LEXIS 4885, *27 [June 12, 2008] ["Representative suits with preclusive effect on nonparties include properly conducted class actions"]; Restatement (Second) of Judgments § 41 [e] & cmt. e [in properly authorized class actions "persons within the class are bound by a judgment for or against the representative"]; 18 Moore's Federal Practice–Civil § 131.40 ["All class members will be bound, under [res judicata] . . . by a final judgment in a class action, including a judgment following settlement, assuming the action met the necessary procedural due process prerequisites"]). The adequacy of representation in the *Allec* action is not at issue here (*see* Restatement (Second) of Judgments § 42 [d]-[f]).

The Attorney General argues, however, that his interest in protecting the public was not represented at all in the *Allec* case. Indeed, he points out that he was not provided with notice of the settlement or an opportunity to object to it. Nevertheless, one specific portion of the relief petitioner seeks here—restitution for pre-January 1, 2002 claims—is identical to that which the New York members of the *Allec* settlement class have already pursued to a final and binding

judgment. As to that measure of relief alone, we hold that there is privity.[16]

Our conclusion is supported by a core principle of res judicata, a party's right to rely upon the finality of the results of previous litigation (*see New York State Labor Relations Bd. v. Holland Laundry, Inc.*, 294 NY 480, 493 [1945] ["[T]he public tranquillity demands that, having been once . . . tried, all litigation of [a] question, and between [the] parties, should be closed forever"]; *Reilly*, 45 NY2d at 28 ["Res judicata is designed to provide finality in the resolution of disputes"]; *cf. Olympic Tower Assoc. v City of New York*, 81 NY2d 961, 962-963 [1993] [settlement agreement

[16] Our holding is in accord with the U.S. Supreme Court's recent rejection of "virtual representation" as a basis for claim preclusion under federal common law (*see Taylor*, 552 US ___, 2008 US LEXIS 4885, *43). With respect to petitioner's claim for restitution, the members of the *Allec* settlement class, on whose behalf the Attorney General sues, have already had their "day in court" (*see id.* at *24, 33-34). Moreover, there is no dispute that the settlement class members' interests were adequately represented in the California court, where they were afforded "the procedural safeguards" codified in California's procedural rules governing class actions (*see id.* at *37-38). Furthermore, our holding today does not authorize " 'de facto class actions,' " rather we give effect to the results obtained in an actually-litigated class action (*see id.* at *38, *quoting Tice v Am. Airlines, Inc.*, 162 F3d 966, 973 [7th Cir 1998]). Finally, our conclusion does not result in the proliferation of an amorphous balancing test, requiring the evaluation of myriad case-specific factors (*see id.* at *39). Instead, we look simply to the judgment approving a class action settlement and the nature of the claims released therein to determine the extent to which petitioner's claim for restitution is precluded.

entitled to res judicata effect]; Siegel, NY Prac § 444 [4th ed] [judgments entered pursuant to settlement are entitled to res judicata effect]). A similar respect for finality has informed our long-standing rule that—absent exceptional circumstances such as duress, illegality, fraud, or mutual mistake (*see Mangini v McClurg*, 24 NY2d 556, 563 [1969])—a settlement must be enforced according to its terms (*see Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993]).

Permitting the Attorney General to seek additional restitution on behalf of the *Allec* settlement class members would undoubtedly "destroy or impair rights" conclusively established in the *Allec* case (*see Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 306-307 [1929] [Cardozo, J.]). Indeed, the Attorney General has asserted that restitution is about making consumers whole. The problem here is that the *Allec* settlement class members have already compromised their entitlement to a full-measure of make-whole relief in a proper judicial forum (*cf. Equal Opportunity Employment Comm'n v Waffle House*, 534 US 279, 297 [2002] ["[I]t 'goes without saying that the courts can and should preclude double recovery by an individual' "]). Although we recognize the importance of permitting petitioner to seek restitution to deter Executive Law and Consumer Protection Act violations, we cannot allow him to do so at the expense of undermining a validly-entered judgment of a sister-state, which it is our constitutional duty to protect (U.S. Const., art. IV, cl. 1, 28 USC § 1738; *O'Connell v Corcoran*, 1 NY3d 179, 184 [2003]; *cf. Matsushita Elec Indus Co. v*

Epstein, 516 US 367, 374 [1996] ["[A] judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit"]).

Our holding does not, however, substantially prejudice the public interest served by the Attorney General in pursuing this action. Indeed, respect for the finality of the *Allec* settlement still permits the Attorney General to seek restitution on behalf of those not bound by the settlement and for the time-periods not embraced therein. In addition, the claims for injunctive relief, civil penalties, and costs remain undisturbed. And, as Supreme Court noted, the Attorney General might be able to obtain disgorgement —an equitable remedy distinct from restitution— of profits that respondents derived from all New York consumers, whether within the *Allec* settlement class or not (*see* 41 AD3d at 8 n 2; *cf. SEC v Fischbach Corp.*, 133 F3d 170, 175 [2d Cir 1997] ["As an exercise of its equity powers, the court may order wrongdoers to disgorge their fraudulently obtained profits"]; *accord Official Comm. of Unsecured Creditors of WorldCom, Inc. v SEC*, 467 F3d 73, 81 [2d Cir 2006]).[17]

We have considered petitioner's arguments regarding the Appellate Division's reversal of those portions of Supreme Court's January 27 Order awarding restitution for damages allegedly

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[17] Although the Attorney General sought disgorgement as an alternative measure of relief in this case, Supreme Court did not grant that relief and—in the present posture— it would be inappropriate for us to do so.

incurred through consumers' participation in the CAP and re-aging programs and we find those arguments meritless. In addition, respondents' argument that extrinsic evidence of consumer deception is required to establish petitioner's Consumer Protection Act claims is unpreserved for our review.

Accordingly, the order of the Appellate Division should be affirmed without costs.

READ, J. (DISSENTING):

The federal Truth-in-Lending Act (TILA) preempts the Attorney General's bid to impose disclosure requirements on Cross Country Bank (CCB)'s credit card solicitations in the guise of this proceeding seeking injunctive relief, restitution and penalties pursuant to Executive Law § 63(12) (fraud), General Business Law § 349 (deceptive business practices), and General Business Law § 350 (false advertising). The majority reaches the opposite conclusion by dint of misreading TILA's special preemption rule for credit or charge card applications or solicitations. I respectfully dissent.

I.

Section 1610(e) of TILA states as follows:

> "Certain credit and charge card application and solicitation disclosure provisions

> "The provisions of subsection (c) of section 1632 [governing the form or manner of disclosure] and subsections (c), (d), (e), and (f) of section 1637 [governing the content or substance of disclosure] shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c) or any renewal notice which is subject to the requirements of section 1637(d), except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections."

The majority reads the clause "which is subject to the requirements of section 1637(c)" to modify "information." Accordingly, the majority reasons, "[t]he scope of section 1610(e) preemption is . . . *expressly limited* to state laws relating to the disclosures *specifically required* under section 1637(c)" (majority op at 17) (emphases added). The majority therefore concludes that "there is no preemption here because neither CCB's claims nor the relief it was granted below have any effect upon these disclosures" (majority op at 15). That is, because there is no conflict between TILA's disclosure requirements and New York's consumer protection laws, CCB may (and indeed must) devise a solicitation complying with both federal and state law.

But the majority's reading of the statutory text is not correct. It completely

> "disregards—indeed, is precisely contrary to—the grammatical 'rule of the last ante-

> cedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, . . . construing a statute in accord with the rule is quite sensible as a matter of grammar" (*Barnhart v Thomas*, 540 US 20, 26 [2003] [quotation marks omitted]; *see also* 2A Singer and Singer, *Statutes and Statutory Construction* § 47:33, at 487 [7th ed 2007] ["Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent"]).

Here, the limiting clause "which is subject to the requirements of section 1637(c)" immediately follows and therefore modifies "any credit or charge card application or solicitation," *not* "information."

The Federal Reserve Board, which implements section 1610(e) through its Regulation Z (12 CFR Part 226), disagrees with the majority's textual analysis: the Board's expression of TILA's special preemption rule is completely at odds with the majority's apparent view that the clause "which is subject to the requirements of section 1637(c)" modifies "information" rather than "application or solicitation." In its discussion of section 1610(e), the Board took the position that "[s]tate laws relating to the disclosure of credit information in credit or charge card applications and solicitations subject to the requirements of [15 USC § 1637[c]) . . . are preempted" (54 Fed Reg

13855, 13855-13856 [Apr 6, 1989]). Accordingly, 12 CFR 226.28(d) states as follows:

> "(d) Special rule for credit and charge cards. State law requirements relating to the disclosure of credit information in *any credit or charge card application or solicitation that is subject to the requirements of [15 USC § 1637[c])* (§ 226.5a of the regulation) . . . are preempted. State laws relating to the enforcement of [15 USC § 1637[c]) . . . are not preempted" (emphasis added).

Concomitantly, the Board has defined those credit or charge card applications or solicitations that *are* subject to the requirements of section 1637(c) (credit or charge accounts used primarily by consumers to purchase goods and services), and those that *are not* (applications or solicitations to open overdraft lines of credit tied to asset accounts accessible by use of a debit card; open-end lines of credit accessed solely by account numbers; home equity lines of credit that may be accessed by the use of a credit or charge card and are subject to the Home Equity Loan Consumer Protection Act of 1988 amendments to TILA; applications and solicitations to add a credit or charge card to an existing open-end plan) (54 Fed Reg at 13856).

According to the Board, then, TILA supplants State law "requirements" that "relat[e] to the disclosure of credit information" in certain credit or charge card applications or solicitations (i.e., those that the Board has determined to be subject to the requirements of 15 USC § 1637[c]) (*id.* at 13855); thus, preemption is not limited to

"state laws relating to the disclosures specifically required under section 1637(c)" (majority op at 17). The Board's view in this regard is entirely consonant with the statute's text, and with Congress' purpose in adopting a special preemption rule in the first place.

At the time TILA was enacted in 1968, "consumer credit [was] preponderantly small and local in both its nature and operation . . . [T]here [was] no national market for consumer credit . . . outside [a consumer's] town or city, although there [was] some mail order business . . . But generally, the market for consumer credit [was] fairly restricted" (Miller and Rohner, *In Search of a Uniform Policy—State and Federal Sources of Consumer Financial Services Law*, 37 Bus Law 1415, 1415-1416 [1981-1982] [footnotes and quotation marks omitted]). In deference to these state interests, TILA preserved state jurisdiction to regulate disclosures in consumer credit transactions, including so-called "traditional" credit or charge card accounts used primarily by consumers to purchase goods and services.

Specifically, section 1610(a)(1) of TILA stated that its provisions did not "annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency." "Since the statute and the legislative history provided [the Board] with little guidance on how to implement the preemption scheme, the [Board] had substantial leeway in deciding how and when state laws would be preempted" (Tid-

well, *Preemption of State Disclosures by the Truth in Lending Act: The Continuing Quest for a Workable Formula*, 40 Bus Law 933, 935-936 [1984-1985] [discussing in detail the Board's interpretation and implementation of TILA preemption from 1969 until the mid-1980s]).

In section 226.6(b) of the original Regulation Z, the Board counseled that a state law was "inconsistent" with TILA or Regulation Z

> "to the extent that it required disclosures or actions 'different' from the requirements of the regulation with respect to form, content, terminology, or time of delivery; disclosure of the amount of the finance charge determined in any manner other than that prescribed by the regulation; and disclosure of the APR determined in any manner other than that prescribed in the regulation" (Tidwell at 936).

In addition, section 226.6(a) of the original Regulation Z "provided that no other information could be placed with the federal disclosures if it would tend to detract from [them] or mislead or confuse the consumer" (Tidwell at 936).

It was generally left up to creditors to decide whether a state law was inconsistent, although the Board issued a number of interpretive letters. A creditor was, in fact, permitted to make an inconsistent state law disclosure so long as it was placed on a separate piece of paper from the TILA disclosures, or below a clearly marked line on the same statement containing the TILA disclosures (12 CFR former 226.6[c]; Tidwell at 936-937). The Board cautioned creditors "that when

making a determination of what information would not mislead, confuse, or detract from the required disclosures, they should be ready to justify their determinations before their enforcement agency and the courts" (*id.* at 938).

"The gist of the policy toward preemption of state laws during the 1970s" has been summarized as follows:

> "State-required disclosures were rarely, if ever, fully preempted in the sense that the creditor was forbidden to use them in contract documents. Instead, *creditors remained subject to any state disclosure law that called for more detailed or different information*, and creditors were always free to make state-required disclosures, either below a demarcation line or as permissible 'additional information' interspersed among the TIL disclosures . . . If a creditor decided to make his own preemption determinations, he ran the risk that a state court might deem the disclosure necessary for contract validity. Therefore, not assuming the risk was considered prudent" (*id.* at 941) (emphasis added).

Not surprisingly, lengthy, complex and confusing credit forms proliferated.

Nonetheless, when Congress passed the Truth in Lending Simplification and Reform Act (Pub L 96-221) in 1980, it only tweaked TILA's preemption provision: the inconsistency standard remained in section 1610(a)(1), although the Board was now mandated to determine if a state law requirement was inconsistent upon the

request of a creditor, state or interested party. Moreover, a state law disclosure requirement could no longer appear in consumer credit contract documents once the Board decided it was inconsistent.[1]

When it revised Regulation Z in 1981 to bring it in line with the TIL Simplification and Reform Act, the Board framed the preemption standard very narrowly so as to displace little state law. That is, a state law was now inconsistent only if it

> "require[d] a creditor to make disclosures or take actions that *contradict[ed]* the requirements of the federal law. A state law [was] contradictory if it require[d] the use of the same term to represent a different amount or a different meaning than the federal law, or if it require[d] the use of a term different from that required in the federal law to describe the same item" (12 CFR former 226.28[a][1]; *see* 46 Fed Reg 20848, 20906 [Apr 7, 1981]) (emphasis added).

In short, "[t]he 'contradictory' standard" in Regulation Z

> "simply remove[d] many state disclosure provisions . . . from the scope of preemption and concomitantly allow[ed] compliance with

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[1] Interestingly, the TIL Simplification and Reform Act also amended TILA preemption so as generally to permit a creditor, state or interested party to petition the Board to determine whether a state-required disclosure was so similar to the disclosure mandated by TILA that creditors in that state could comply with the state law in lieu of making TILA disclosure (*see* 15 USC § 1610[a][2]).

> state law in borderline situations. Allowing creditors to comply with state disclosure requirements until the [Board] ma[de] a preemption determination remove[d] any fear of creditor violation of the TILA by making these required [state] disclosures" (Tidwell at 944).

Congress next revisited TILA in a major way in 1988, when it enacted the Fair Credit and Charge Card Disclosure Act (FCCCDA) (Pub L 100-583). By 1988, the credit card business was a large, nationwide industry, not "preponderantly small and local in both its nature and operation," as had been the case in 1968 when TILA was enacted. In addition, beginning in 1986 with Wisconsin's enactment of a disclosure statute, state legislation in this area was burgeoning: by the time the FCCCDA was adopted, "at least 11 states and Suffolk County in New York had enacted new cost of credit legislation designed to foster price competition among card issuers" (Gelb and Cubita, *The Fair Credit and Charge Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus Law 941, 941 n 1 [1988-1989]). So this time, Congress tackled preemption head on, devising a "special" rule for disclosure of credit information in credit or charge card applications or solicitations, which "depart[ed] radically from" the inconsistency standard, "the approach which Congress historically [had] adopted in the credit disclosure area" (Gelb and Cubita at 955).

The FCCCDA dictated what credit information had to be disclosed (15 USC § 1637[c], [e] and [f]),

and the manner of its disclosure (15 USC 1632[c]) in credit or charge card applications or solicitations. To ensure that the marketplace did not outpace its detailed mandates, Congress in section 1637(c)(5) provided as follows:

> "Regulatory authority of the Board
>
> "The Board may, by regulation, require the disclosure of information *in addition to* that otherwise required by this subsection . . ., and *modify any disclosure of information required by* this subsection . . ., in any application to open a credit card account for any person under an open end consumer credit plan or any application to open a charge card account for any person, or a solicitation to open any such account without requiring an application, if the Board determines that such action is necessary to carry out the purpose of, or prevent evasions of, any paragraph of this subsection" (emphasis added).

Section 1610(e), as previously discussed, then specified that the provisions of sections 1632(c) (governing the form or manner of disclosure) and 1637(c),(e) and (f) (governing the content or substance of disclosure) "supersede[d] any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c)" except to enforce TILA and Regulation Z.

Congress thus occupied the entire field of cost-of-credit disclosures in credit or charge card applications or solicitations: it set out compre-

hensive requirements and established a singular *federal* mechanism (the Board) to add to or modify these requirements to keep abreast of developments in the consumer credit or charge card business. A state may enforce TILA's disclosure provisions, and surely a state may bring consumer complaints to the Board's attention and advocate revisions to Regulation Z. The language of section 1610(e) and the structure of TILA's regulatory scheme after Congress' adoption of the FCCCDA, however, belie any notion that a state may use its consumer protection laws to impose additional or different cost-of-credit disclosure on a creditor. The majority's contrary statutory interpretation produces a patchwork scheme whereby each state may effect different or additional credit disclosure requirements unless and until the Board acts pursuant to section 1637(c)(5) to regulate the form or substance of disclosure of the same item of credit information, which would perforce then become "information . . . which is subject to section 1637(c)."[2] This, of

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[2] At least I assume that the majority would, at a minimum, acknowledge that if the Board, for example, ultimately amends Regulation Z to require disclosure of the effect of fees or a security deposit upon an applicant's credit limits in credit card applications (*see* majority op at 21, n 14), the State could no longer challenge the form or substance of the disclosure of credit limits via a lawsuit grounded in State consumer protection laws. That is, when my colleagues state that "[t]he scope of section 1610(e) preemption is . . . expressly limited to state laws relating to the disclosures specifically required under section 1637(c)" (majority op at 17), I assume they must intend "disclosures specifically required under section 1637(c)" to include any additional or modified disclosures required in Regulation Z

course, completely undermines the uniformity of the federal regime that Congress devised to govern a nationwide industry. Moreover, it leaves no room for the possibility that the Board may have policy reasons *not* to mandate a particular disclosure that a state considers to be warranted (*see Arkansas Elec. Coop. Corp. v Arkansas Pub. Serv. Commn.*, 461 US 375, 384 [1983] [Under the Supremacy Clause, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate"]).

As the discussion of the evolution of TILA preemption illustrates, before Congress adopted the special preemption rule, states supplemented federal credit disclosure requirements with regularity. If Congress had wanted this state of affairs to continue, there would have been no need for it to supplant the inconsistency/contradictory standard in section 1610(a)(1) (as interpreted by the Board in Regulation Z) with the special preemption rule in section 1610(e). By reading the special preemption rule as it does, the majority has undone Congress' handiwork: the majority has effectively reinstated the inconsistency/contradictory standard for disclosures in credit or charge card applications or solicitations. While the majority cloaks its interpretation of section 1610(e) in the garb of the presumption

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by the Board pursuant to its section 1637(c)(5) authority. If not, the injury to the federal regime would be even more severe.

against preemption of state law (majority op at 16-17), the presumption does not empower a state court to circumvent Congress' will as expressed in non-ambiguous statutory language ("In all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress*," *Medtronic v Lohr*, 518 US 470, 485 [1996] [emphasis supplied, internal quotation marks and citations omitted]).

II.

In this litigation, the Attorney General has taken the position—approved by the majority—that

> "*the overall impression* of CCB's representations regarding its credit cards, taken as a whole, was fraudulent and misleading to the average consumer. The flaw in these representations was not that they failed to provide the disclosures required by TILA, but rather that they affirmatively misled consumers and thus violated New York's consumer protection laws. *Because the petition alleges affirmative deception rather than inadequate disclosure, the claim is not preempted by TILA*" (emphases added).

In sum, the Attorney General argued that whether or not CCB's solicitations comported with TILA or Regulation Z was basically irrelevant because he was only suing to enforce state

laws prohibiting unfair or deceptive acts or practices, and TILA does not preempt these state laws. He stressed that he did not seek or obtain "an order requiring that anything actually be disclosed, but rather requested and received an order enjoining [CCB] from misrepresenting credit terms."

The foundation for the Attorney General's analytical edifice is the Board's discussion of the scope of section 1610(e) when it revised Regulation Z to implement the FCCCDA. In fact, the Attorney General argues that the Board "directly answer[ed] the question posed in this case by declaring that 'prohibitions against unfair and deceptive acts or practices (such as 'mini-FTC acts') also are not preempted,'" quoting the Board's commentary accompanying the final version of section 228.28(d) of Regulation Z (54 Fed Reg at 13864; *see also* majority op at 20-21).

First, the statement that the Attorney General seizes upon is both truncated and taken out of context. The paragraph in which it appears reads in its entirety as follows:

> "In addition, state laws regulating the substance of transactions subject to section 127(c) (15 USC § 1637[c] [applications and solicitations]) or (d) (15 USC § 1637[d] [renewal notice]) are not preempted, nor are state laws preempted that regulate the form or content of the disclosure of information that is unrelated to the scope and content of information required to be disclosed section 127(c) or (d). Thus, for example, the following types of state laws are not preempted: laws

> requiring card issuers to offer a grace period[3] or prohibiting certain fees in credit or charge card transactions; laws such as retail installment sales acts and plain language laws[4], unless they regulate the disclosure of credit term information in credit and charge card applications, solicitations or renewal notices; laws requiring notice of a consumer's rights under the antidiscrimination or similar laws; and laws notifying consumers about credit information available form state authorities. *Finally, state laws regarding the enforcement of the requirements of section 127(c) or (d) or of any prohibitions against unfair and deceptive acts or practices (such as state 'mini-FTC acts') also are not preempted*" (54 Fed Reg at 13863-13864) (emphasis added).

This last sentence accords with the House Conference Report for the FCCCDA, which also discussed the use of mini-FTC statutes *solely* in the context of enforcing TILA and Regulation Z (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 21-22, reprinted in 1988 USCCAN at 3960;[5]

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[3] *See e.g.* Personal Property Law § 413(3)(c)(ii).

[4] *See e.g.* General Obligations Law § 5-702.

[5] Here, the Attorney General concededly did not bring this lawsuit to enforce TILA or Regulation Z; therefore, the comment in the House Conference Report to the effect that disclosures beyond those specified in section 1637(c) might be required or obtained in the settlement or adjudication of such a lawsuit is beside the point here (*see* majority op at 20).

see also 12 CFR part 226, supp I at 577 [2008 ed]; Gelb and Cubita, *Implementation of the Fair Credit and Charge Card Disclosure Act of 1988: The Regulatory Response*, 44 Bus Law 1427, 1437 [1988-1989] ["[T]he supplementary information accompanying the final regulation indicates that [section 1610(e)] would not preempt state laws concerning the substance of credit card arrangements[6] or the form and content of disclosures that are unrelated to the scope and content of the federal application, solicitation, and renewal disclosures" and, "[b]y way of illustration," offers examples]).

What is notably missing from the Board's discussion is any suggestion whatsoever that state mini-FTC laws might—after enactment of the FCCCDA with its special preemption rule—remain available as a mechanism to impose disclosure requirements on creditors over and above those mandated by TILA and Regulation Z. Indeed, the Board emphasized that

> "[s]tate laws relating to *the terms of credit* required to be disclosed or *the manner* in which such terms must be disclosed are preempted as to any credit or

[6] For example, section 1610(e) would not have prevented the Attorney General from challenging CCB's *practice* of charging fees and security deposits that constitute a majority of a consumer's credit limit for the first 12 months of the account (*see* majority op at 21 n 14 [discussing proposed Regulation AA, which would regulate this practice under the Federal Trade Commission Act because it "appears to be an unfair act or practice" (73 Fed Reg 28904, 28923 [May 19, 2008])]).

> charge card application or solicitation that is subject to [15 USC § 1637[c]) . . . The preemption of such provisions of state law is *total*, and differs from other provisions of the TILA which generally preempt only inconsistent state laws" (54 Fed Reg at 13863) (emphases added).

This position is in tune with the text of section 1610(e) and the history of the special preemption rule; it is reflected in the broad wording chosen by the Board to implement section 1610(e)—i.e., "[s]tate law requirements relating to the disclosure of credit information."

Finally, the Attorney General (and the majority) cannot evade preemption by portraying this enforcement action as a suit to enjoin a misleading and fraudulent "overall impression" rather than "inadequate disclosure." The only way for CCB to dispel the complained-about "overall impression"—the only way for CCB to comply with Supreme Court's injunction[7]—is to revise and alter the form and content of its solicitations; i.e., to make different and/or additional disclosures (*compare* majority op at 16 ["We again emphasize . . . that (the Attorney General's) success in this case does not force (CCB) . . . to affirmatively disclose any additional credit terms"]). Neither the Attorney General nor the majority explains how else CCB may elimi-

[7] In relevant part, the injunction enjoins CCB "from engaging in the fraudulent, deceptive and unlawful acts and practices alleged in the Verified Petition" by "misrepresenting" certain credit information.

nate the alleged misrepresentations from its solicitations.

III.

Just a few months ago, the United States Supreme Court handed down *Riegel v Medtronic, Inc.* (___US ___, 128 S Ct 999 [2008]). Riegel sued Medtronic for damages, alleging that a catheter marketed by the company was "designed, labeled and manufactured in a manner that violated New York common law, and that these defects caused [him] to suffer severe and permanent injuries" (128 S Ct at 1005). The type of catheter implicated in Riegel's injuries had received premarket approval from the Food and Drug Administration(FDA) under a federal safety oversight regime created by the Medical Device Amendments of 1976 (MDA). The MDA includes a preemption provision; specifically, 21 USC § 360k(a) provides that a state shall not

> "establish or continue in effect with respect to a device . . . any requirement—(1) which is different from, or in addition to, any requirement applicable under [federal law] to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under [relevant federal law]."

The issue in *Riegel* was whether the FDA's approval of the catheter precluded the New York common law tort suit. The Supreme Court (affirming the United States Court of Appeals for

the Second Circuit) decided that the MDA preempted Riegel's civil suit, reasoning that "[a]bsent other indication, [Congress'] reference to a State's 'requirements' includes its common-law duties," and these "requirements" were "different from, or in addition to" the federal ones (128 S Ct at 1008). Further, the Court remarked that section 360k did "not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations" because in such a case the state duties would " 'parallel' rather than add to, federal requirements" (*id.* at 1011).

This is an even clearer case for preemption than *Riegel*. In *Riegel*, the preemption provision did not explicitly mention civil tort liability. Here, there can be no doubt that the Attorney General's claims under the Executive Law and the General Business Law are made under a "provision of the law of [the] State relating to the disclosure of information" in solicitations governed by TILA (15 USC § 1610[e]); or, as articulated by the Board, are "[s]tate law requirements relating to the disclosure of credit information" (12 CFR 226.28[d]). As the Supreme Court has observed, "[t]he ordinary meaning of [the phrase 'relating to'] is a broad one—to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with—and the words thus express a broad pre-emptive purpose" (*Morales v TWA*, 504 US 374, 383 [1992] [quotation marks and citation omitted]). The majority avoids this evident conclusion only by resorting to its faulty analysis that the "scope of section 1610(e) preemption is . . .

expressly limited to state laws relating to disclosures specifically required under 1637(c)" (majority op at 17).

The majority also concludes that the MDA's preemption provision is broader than section 1610(e) because the former displaces those state requirements that are "different from, or in addition to" federal law. Yet again, the majority relies on its erroneous reading of section 1610(e) to "expressly limit[ ]" preemption "to state laws relating to the disclosures specifically required under section 1637(c)" (majority op at 17). In fact (and as discussed previously), the wording of section 1610(e) illustrates its preemption of the entire field of disclosure of cost-of-credit information in credit or charge card solicitations. Indeed (as discussed previously), under the formerly applicable inconsistency/contradictory standard, states were empowered to enforce state law disclosure requirements that differed from or added to the requirements established for credit or charge card solicitations by Congress in TILA. Congress fashioned the "special" preemption rule in section 1610(e) precisely because it wanted to cut off and fully supplant supplemental state regulation in this area: only the Board may add to or modify TILA's statutory disclosure requirements.

Finally (again as discussed previously), the relief that the Attorney General sought (and has obtained) inevitably calls for CCB to alter the format and content of the disclosures in its credit or charge card solicitations of consumers *in New York*, thus "disrupt[ing] the federal scheme" envisaged and designed by Congress to "enhance credit shopping" by requiring "more detailed and

uniform" disclosure of credit information to consumers nationwide (*see Riegel*, 128 S Ct at 1008; 54 Fed Reg at 13855; *compare* majority op at 17).

IV.

The majority's desire to maximize our State's regulatory reach in the area of consumer protection is unsurprising. And the Board has arguably been slow to appreciate the value to consumers of at least certain of the specific disclosures at issue in this case (*see* 72 Fed Reg 32948 [June 14, 2007] [proposal by the Board to amend Regulation Z following a comprehensive review of TILA's rules for open-end (revolving) credit that is not home-secured]). But State pride and good intentions are not enough to justify this lawsuit. To borrow words from the Second Circuit's decision in a recent preemption case, "[i]f New York's view regarding the scope of its regulatory authority carried the day, another state could be free to enact," its own laws or bring its own lawsuits to supplement or modify the credit disclosures required by TILA and Regulation Z, thus "unraveling the centralized federal framework" in this area (*Air Transp. Assn. of Am. v Cuomo*, 520 F3d 218, 225 [2d Cir 2008] [determining that federal law preempts New York State's Passenger Bill of Rights (General Business Law 251-g[1])]). In enacting section 1610(e), Congress essentially decided that the benefits from a uniform, nationwide regime for disclosure under the aegis of the Board outweighed any loss of protection to consumers under state law. The Supremacy Clause permits Congress to make this

judgment, and we are bound to honor it. Accordingly, I respectfully dissent.

* * * * * * * * * * * * * * * * * *

Order affirmed, without costs. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Graffeo, Pigott and Jones concur. Judge Read dissents in an opinion. Judge Smith took no part.

Decided June 26, 2008

No. 97985

SUPREME COURT, APPELLATE DIVISION
THIRD DEPARTMENT, NEW YORK

December 1, 2005

IN THE MATTER OF THE PEOPLE OF THE STATE OF NEW YORK, BY ELIOT SPITZER, AS ATTORNEY GENERAL,

Respondent,

—v.—

APPLIED CARD SYSTEMS, INC., et al.,

Appellants.

Appeal from an order and judgment of the Supreme Court (Cannizzaro, J.), entered June 24, 2004 in Albany County. The order and judgment, among other things, granted petitioner's application, in a proceeding pursuant to Executive Law § 63(12), to enjoin respondents from engaging in certain fraudulent acts.

APPEARANCES OF COUNSEL

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Eliot Spitzer, Attorney General, Albany *(Mark D. Fleischer* of counsel), for respondent.

OPINION OF THE COURT

PETERS, J.

Respondent Cross Country Bank, Inc. (hereinafter CCB) provides credit cards to consumers who are otherwise unable to qualify for credit. Respondent Applied Card Systems, Inc. (hereinafter ACS) services CCB's accounts and engages in collection activities. Petitioner contends that CCB was representing, in direct mail solicitations, that prospective consumers would be approved for a credit limit up to $2,500 when, in reality, credit limits were often less than $400. Each account was assessed a $100 application fee and a $50 annual membership fee immediately upon the opening of the account, often leaving the consumer with far less credit than they had originally anticipated. This led to a downward spiral of accruing interest, late fees and over-limit penalties. Moreover, unbeknownst to consumers, CCB allegedly enrolled them in third-party membership benefit programs for which a fee was immediately assessed upon the account. One such program, the Credit Account Protection (hereinafter CAP) program, was vir-

tually useless to New York consumers. Petitioner further alleged that ACS employees would harass consumers by telephone wherein they would, among other things, misrepresent their identities to facilitate contact with the consumer, call them at work after having been instructed not to do so, use obscene and abusive language, and make unauthorized debits from their checking accounts.

In April 2003, petitioner commenced this special proceeding pursuant to CPLR 409(b) to permanently enjoin respondents from engaging in these activities. It alleged violations of Executive Law § 63(12), General Business Law §§ 349 and 350, and General Business Law article 29-H. Respondents denied the allegations and raised numerous affirmative defenses. Upon Supreme Court's issuance of a permanent injunction preventing respondents from engaging in the challenged activities, this appeal ensued.

Special proceedings brought pursuant to CPLR 409(b) are subject to the same standards that apply to a motion for summary judgment (*see* CPLR 409[b]; *Matter of Port of N.Y. Auth. [62 Cortlandt Realty Co.]*, 18 N.Y.2d 250, 255 [1966], *cert. denied sub nom. McInnes v. Port of N.Y. Auth.*, 385 U.S. 1006 [1967]; *Matter of People v Telehublink Corp.*, 301 A.D.2d 1006, 1007 [2003]). Under Executive Law § 63, the Attorney General may utilize CPLR 409(b) to seek injunctive relief against any business engaged in repeated fraudulent or illegal conduct in the

transaction of business.[1] The test is whether the act complained of "has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud. Executive Law § 63(12) was meant to protect not only the average consumer, but also 'the ignorant, the unthinking and the credulous' " (*People v General Elec. Co.*, 302 A.D.2d 314, 314 [2003] [citations omitted], quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273 [1977]) As to the claims alleging deceptive business practices or false advertising under General Business Law §§ 349 and 350, the Attorney General was required to establish that respondents engaged " 'in an act or practice that is deceptive or misleading in a material way and that [the consumer] has been injured by reason thereof' " (*Small v Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55 [1999], quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 N.Y.2d 20, 25 [1995]; *accord Solomon v Bell Atl. Corp.*, 9 A.D.3d 49, 54 [2004]). While the proof must show that the representations or omissions are "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra* at 26) for conduct to be actionable it need "not necessarily rise to the level of fraud" (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 343 [1999]); even omissions may be the basis for such claims (*see Bildstein v MasterCard Intl.*,

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[1] Such conduct has been defined as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions" (Executive Law § 63[12]).

2005 WL 1324972 *3 2005 US Dist LEXIS 10763, 10-11 [SDNY, June 6, 2005]).

(1) Reviewing these solicitation offers as a whole (*see Matter of Lefkowitz v E.F.G. Baby Prods. Co.*, 40 A.D.2d 364, 368 [1973]), and recognizing that the interpretations of the Federal Trade Commission Act (*see* 15 USC § 45 *et seq.*) are useful in determining the aforementioned violations under both the Executive Law and General Business Law (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra* at 26; *Matter of State of New York v Colorado State Christian Coll. of Church of Inner Power*, 76 Misc.2d 50, 54-55 [1973]), we agree that the violations were established as a matter of law. The offers had a prominent display informing consumers that they had been "preapproved" for a credit limit up to $1,000 or $2,500. They did not state that most consumers who received these solicitations do not receive even half of the amount listed. While minimum credit limits were detailed in the solicitations, no disclosures revealed how likely a consumer was to receive amounts above the minimum. Scripts used by telemarketers to solicit consumers did not clarify this information or reveal credit limits usually granted. In response to the representation by CCB's vice president, Paul Seitz, that these problems had been corrected since June 2001, our review of the new disclosures found the correction to be embedded on the second page of the "Terms and Conditions of Offer," in the same typeface as the rest of the paragraph. Recognizing that respondents submitted the affidavit of Donald Whittaker, a private con-

sultant who reviewed the terms of the solicitation from December 2001, categorizing the disclosure as "unsurpassed in the industry," we find Supreme Court to have correctly determined that neither of these proffers addressed the obvious problems associated with the initial solicitations. As to the later solicitations, they still did not represent an accurate estimation of a consumer's credit limit; at all times, it appeared that the confusion was purposely fostered by respondents' telemarketers. As the allegations here "are based on deceptive business practices, not on deceptive contracts" (*Gaidon v Guardian Life Ins. Co. of Am., supra* at 345), we agree that regardless of what the industry standards are for these disclosures, a reasonable consumer would be misled in believing that the "up to" amount boldly displayed on the solicitation letter was representative of a likely amount that a consumer would receive (*see Federal Trade Commn. v Febre,* 1996 WL 396117, *2, 1996 US Dist LEXIS 9487, *7-11 [N.D.Ill., July 3, 1996], *affd.* 128 F.3d 530 [1997]).

We further agree with Supreme Court that the information about the applicability of the CAP program in New York was deceptive. First, consumers could inadvertently enroll in the CAP program because its acceptance line was directly above the similarly looking acceptance line for the credit card. Second, the explanation regarding the benefits of the program, provided in a separate insert, described unemployment, family leave, life, dismemberment and disability benefits when only the life, dismemberment and disability benefits were available to New York consumers; that limitation was also embedded in

the fine print of the benefit description. For these reasons, the solicitations were misleading as a matter of law (*see generally Federal Trade Commn. v Crescent Publ. Group,* 129 F.Supp.2d 311, 321 [2001]) because a reasonable consumer was led to believe that by signing up for the program, he or she would be protected in case of an income loss due to the conditions described.

Next addressing the practice of automatically enrolling consumers in the Applied Advantage Program for which they were charged an additional fee on their already-limited credit card, the practice was no more palatable simply because the consumers could discontinue it at any time.[2] The solicitation letters stated, in the middle of the letter, that "[b]y simply responding to our 'invitation' and also accepting membership in Applied Advantage, you will be granted a Visa Gold credit card." To opt out, consumers were required to check a box at the bottom of the letter to indicate that they did *not* want to be enrolled in the program; it was not clear that a credit card, albeit with limited credit, would still be issued if they declined such membership. Although the later solicitation letters did not mention the Applied Advantage Program in the text of the initial solicitation, and instead provided a box on the bottom of the letter to indicate whether consumers wished to process the application with the Applied Advantage membership, the solicitations, as a whole, led consumers to believe that they had to participate in the costly program to achieve the credit desired. To the

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[2] In later solicitations, membership was not automatic.

extent that respondents voluntarily discontinued automatic membership in such program, such voluntary discontinuance of fraudulent or deceptive practices will not bar the issuance of an injunction to prevent future practices (*see Federal Trade Commn. v Crescent Publ. Group, supra* at 320; *People v. General Elec. Co.*, 302 A.D.2d 314, 316 [2003], *supra*).

(2) We next reject respondents' contention that the Federal Truth in Lending Act (*see* 15 USC § 1601 *et seq.*) preempted petitioner's claims because the allegations seek to establish that CCB's disclosures were inadequate—an area within the exclusive province of said Act. In our view, the allegations instead pertain to unfair or deceptive acts or practices which are illegal under state law. As such, they are not preempted (*see* 12 CFR part 226, Supp. I, ¶ 28[d][1]; 12 CFR 226.28[d]; *Therrien v Resource Fin. Group,* 704 F.Supp. 322, 329 [1989]).[3]

Finally, considering the allegation that ACS engaged in improper debt collection practices pursuant to General Business Law article 29-H, the record reflects that despite an initial training emphasizing the parameters of the Debt Collection Procedures Act, the practice changed once

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[3] This contention was not waived by respondents' failure to raise it as an affirmative defense in the answer (*see generally* CPLR 3018[b]) since it was used as a defense in the summary judgment motion (*see Rogoff v San Juan Racing Assn.*, 77 A.D.2d 831, 832 [1980], *affd.* 54 N.Y.2d 883, [1981]). Nor do we find that prejudice enured to petitioner after we considered the affirmative defenses that were properly raised (*see Sheils v County of Fulton,* 14 A.D.3d 919, 921 [2005], *lv denied* 4 N.Y.3d 711 [2005]).

actual collection practices commenced. ACS employees were encouraged to use aggressive and illegal practices, and evidence demonstrated that the salary of both the collector and the supervisor were determined by their success. Affidavits further established that ACS collectors used rude and obscene language with consumers, repeatedly called them even when requested not to do so, misrepresented their identities to gain access, and made unauthorized debits to consumer accounts. Petitioner presented approximately 203 complaints from consumers describing these practices and proffered affidavits from former employees, some supervisory, to confirm these allegations. While respondents submitted affidavits of several current employees of ACS which either detailed their compliance practice or challenged other proof submitted by petitioner, Supreme Court properly concluded that these submissions were insufficient to create an issue of fact regarding the specific allegations made in the consumer complaints.

MERCURE, J.P., CREW III, CARPINELLO and KANE, JJ., concur.

ORDERED that the order and judgment is affirmed, without costs.

15 U.S.C. § 1610. Effect on other laws

(a) Inconsistent provisions; procedures applicable for determination

(1) Except as provided in subsection (e) of this section, this part and parts B and C of this subchapter do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency. Upon its own motion or upon the request of any creditor, State or other interested party which is submitted in accordance with procedures prescribed in regulations of the Board, the Board shall determine whether any such inconsistency exists. If the Board determines that a State-required disclosure is inconsistent, creditors located in that State may not make disclosures using the inconsistent term or form, and shall incur no liability under the law of that State for failure to use such term or form, notwithstanding that such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(2) Upon its own motion or upon the request of any creditor, State, or other interested party which is submitted in accordance with procedures prescribed in regulations of the Board, the Board shall determine whether any disclosure required under the law of any State is substantially the same in meaning as a disclosure required under this subchapter. If the Board determines that a State-required disclosure is

substantially the same in meaning as a disclosure required by this subchapter, then creditors located in that State may make such disclosure in compliance with such State law in lieu of the disclosure required by this subchapter, except that the annual percentage rate and finance charge shall be disclosed as required by section 1632 of this title, and such State-required disclosure may not be made in lieu of the disclosures applicable to certain mortgages under section 1639 of this title.

(b) State credit charge statutes

Except as provided in section 1639 of this title, this subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply. The provisions of section 1639 of this title do not annul, alter, or affect the applicability of the laws of any State or exempt any person subject to the provisions of section 1639 of this title from complying with the laws of any State, with respect to the requirements for mortgages referred to in section 1602(aa) of this title, except to the extent that those State laws are inconsistent with any provisions of section 1639 of this title, and then only to the extent of the inconsistency.

(c) Disclosure as evidence

In any action or proceeding in any court involving a consumer credit sale, the disclosure of the annual percentage rate as required under this subchapter in connection with that sale may not be received as evidence that the sale was a loan or any type of transaction other than a credit sale.

(d) Contract or other obligations under State or Federal law

Except as specified in sections 1635, 1640, and 1666e of this title, this subchapter and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law.

(e) Certain credit and charge card application and solicitation disclosure provisions

The provisions of subsection (c) of section 1632 of this title and subsections (c), (d), (e), and (f) of section 1637 of this title shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c) of this title or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

114

(3)

No. 08-405

Supreme Court, U.S.
FILED
DEC - 9 2008
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IN THE

Supreme Court of the United States

CROSS COUNTRY BANK, INC.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK, by ANDREW CUOMO, Attorney General of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

A provision of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1610(e), provides that TILA disclosure requirements for credit or charge card solicitations or applications supersede related state laws. The question in this case is:

> Whether state deceptive practices laws "relate" to TILA disclosure requirements such that the state laws are preempted by § 1610(e).

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

SUPPLEMENTAL STATEMENT OF STATUTES AT ISSUE 1

STATEMENT 1

REASONS FOR DENYING THE PETITION ... 18

CONCLUSION 26

SUPPLEMENTAL APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 13

Egelhoff v. *Egelhoff*,
532 U.S. 141 (2001) 12

Ford Motor Credit Co. v. Milhollin,
444 U.S. 555 (1980) 15

FTC v. Febre,
1996 U.S. Dist. LEXIS 9487 (N.D. Ill. July 3, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997) 22

Gaidon v. Guardian Life Ins. Co. of Am.,
94 N.Y.2d 330 (1999) 24

Goshen v. Mut. Life Ins. Co. of N.Y.,
98 N.Y.2d 314 (2002) 14

Matter of Food Parade, Inc. v. Office of Consumer Affairs,
7 N.Y.3d 568 (2006) 24

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 20, 21

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 12, 14, 16, 19

Cited Authorities

Page

N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 12, 13-14, 20

Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20 (1995) 1, 14

People v. Applied Card Systems, Inc., 41 A.D.3d 4 (2007) 9

Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008) 14, 17, 19

Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989 (2008) 12, 21

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 12

FEDERAL STATUTES

Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960 2

15 U.S.C. § 45 1

15 U.S.C. § 1601 *et seq.* 1

15 U.S.C. § 1610 ..... *passim*

Cited Authorities

Page

15 U.S.C. § 1632 ..... 2, 3

15 U.S.C. § 1637 ..... *passim*

15 U.S.C. § 1640 5

STATE STATUTES

New York General Business Law § 349 ..... 1, 7

New York General Business Law § 350 ..... 1, 7

New York Executive Law § 63(12) 1, 6-7

ADMINISTRATIVE MATERIALS

Truth in Lending; Credit and Charge Card Disclosures (Final Rule), 54 Fed. Reg. 13,855 (Apr. 6, 1989) ..... *passim*

Unfair or Deceptive Practices Act, 73 Fed. Reg. 28,904 (May 19, 2008) 22

12 C.F.R. § 226 ..... *passim*

12 C.F.R. § 226.5a 2, 6

12 C.F.R. § 226.9 ..... 2, 6

12 C.F.R. § 226.28 ..... *passim*

12 C.F.R. Part 226, supplement I ..... *passim*

Page

MISCELLANEOUS AUTHORITIES

H.R. Conf. Rep. No. 100-1069 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3951 ..... *passim*

S. Rep. No. 100-259 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3936 ..... *passim*

Office of the Comptroller of the Currency Advisory Letter 2004-4 (Apr. 28, 2004), *available at* 2004 OCC CB LEXIS 31 22

SUPPLEMENTAL STATEMENT OF STATUTES AT ISSUE

New York General Business Law §§ 349-350 and New York Executive Law § 63(12) are reproduced in respondent's Supplemental Appendix.

STATEMENT

1. New York's Consumer Protection Act, New York General Business Law ("GBL") §§ 349 to 350-f-1, prohibits fraudulent or deceptive business practices; it is modeled after the anti-fraud provisions of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45. *See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995). Enacted in 1970, it declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state," GBL § 349(a), and any "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state," GBL § 350. A separate law, enacted in 1951, authorizes the New York Attorney General to seek injunctive and other relief for repeated or persistent fraudulent business activities. N. Y. Exec. Law § 63(12).

2. The federal Truth in Lending Act ("TILA") requires, among other things, the disclosure of information in consumer credit transactions in order to promote the informed use of credit. *See* 15 U.S.C. § 1601 *et seq.* Since its enactment in 1968, TILA has preempted state laws "relating to the disclosure of information in connection with credit transactions," but only to the

extent of the state laws' inconsistency with TILA or its implementing regulations. 15 U.S.C. § 1610(a)(1); *see also* 12 C.F.R. § 226.28(a)(1). In 1988, TILA was amended to add disclosure requirements at the solicitation and application stage of open-end credit and charge cards. *See* Fair Credit and Charge Card Disclosure Act of 1988 ("FCCCDA"), Pub. L. No. 100-583, 102 Stat. 2960. The purpose of the amendments was to provide for detailed, uniform disclosures at an earlier stage in order to enhance credit shopping. *See* Truth in Lending; Credit and Charge Card Disclosures (Final Rule), 54 Fed. Reg. 13,855, 13,855 (Apr. 6, 1989). The FCCCDA requires the disclosure of information on credit and charge card applications and solicitations that describes the card's (i) annual percentage rate; (ii) annual and other fees, including membership fees, late fees, and over-the-limit fees; (iii) any grace period; and (iv) the balance calculation method. *See* 15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a(b). The required disclosures must be clear and conspicuous and must be provided in a prescribed tabular form. *See* 15 U.S.C. §§ 1632 (a),(c), 1637(c); 12 C.F.R. § 226.5a(a)(2).[1]

The FCCCDA added a special preemption clause, 15 U.S.C. § 1610(e), which creates broader preemption for credit and charge card applications and solicitations than the general preemption provision at 15 U.S.C. § 1610(a)(1). The special preemption clause provides that the disclosure and tabular format requirements described above

> shall supersede any provision of the law of any State relating to the disclosure of information

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1. The FCCCDA also governs renewal notices for credit and charge cards. *See* 15 U.S.C. § 1637(d); 12 C.F.R. § 226.9(e).

> in any credit or charge card application or solicitation which is subject to [the disclosure requirements of 15 U.S.C. §§ 1637(c)], except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.[2]

15 U.S.C. § 1610(e); *see also* 12 C.F.R. § 226.28(d).

The Senate Banking Committee Report and House Conference Report accompanying the passage of the FCCCDA both conclude that § 1610(e) does not preempt state unfair or deceptive practices laws. The Senate Banking Committee Report states that § 1610(e) "applies to State credit card disclosure laws, not to general disclosure statutes such as State retail installment sales acts and State plain language statutes. *Nor does it apply to the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices.*" S. Rep. No. 100-259, at 9 (1987),

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2. 15 U.S.C. § 1610(e) states, in its entirety:

> The provisions of subsection (c) of section 122 [15 USCS § 1632(c)] and subsections (c), (d), (e), and (f) of section 127 [15 USCS § 1637(c),(d),(c), and (f)] shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 127(c) [15 USCS § 1637(c)] or any renewal notice which is subject to the requirements of section 127(d) [15 USCS § 1637(d)], except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

reprinted in 1988 U.S.C.C.A.N. 3936, 3945 (emphasis added). Similarly, the House Conference Report states:

> This section applies to State credit and charge card disclosure laws, not to general disclosure statutes such as State retail installment sales acts and State plain language statutes. Nor does this section affect other State consumer laws regarding credit cards or charge cards, such as a State statute requiring banks in that State to offer a grace period.
>
> Moreover, this section does not affect any State law enacted or used to enforce the requirements of section 127(c) through (f). For example, *this section does not apply to the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices*. Therefore, nothing contained in this section shall be construed to prevent a federal, state or local agency which enforces an unfair and deceptive acts or practices statute from requiring or obtaining the requirements of a specific disclosure beyond those specified in Section 127(c) in the settlement or adjudication of a specific case or cases. Thus, any State may employ or establish laws for the purpose of enforcing the Federal disclosure requirements.

H.R. Conf. Rep. No. 100-1069, at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3951, 3960 (emphasis added).

Congress has delegated expansive power to the Board of Governors of the Federal Reserve System to explain, expand, or modify the statutory framework governing TILA. *See, e.g.*, 15 U.S.C. §§ 1637(c)(5), 1640(f). The Board executes this responsibility by promulgating and frequently revising Regulation Z, TILA's implementing regulation, *see* 12 C.F.R. pt. 226; by issuing opinions on preemption, *see, e.g.*, 12 C.F.R. § 226.28; and through Official Staff Interpretations of TILA and Regulation Z, *see* 12 C.F.R. pt. 226, supplement I. In this capacity, the Board has also stated repeatedly that § 1610(e) does not preempt state unfair or deceptive practices laws. For example, the Board's rulemaking accompanying its 1989 revisions to Regulation Z elaborates on the scope of preemption under § 1610(e):

> In addition, state laws regulating the substance of transactions subject to section 127 (c) or (d) are not preempted, nor are state laws preempted that regulate the form or content of the disclosure of information that is unrelated to the scope and content of information required to be disclosed under section 127 (c) or (d). Thus, for example, the following types of state laws are not preeempted: laws requiring card issuers to offer a grace period or prohibiting certain fees in credit or charge card transactions; laws such as retail installment sales acts and plain language laws, unless they regulate the disclosure of credit term information in credit and charge card applications, solicitations or renewal notices; laws requiring notice of a

> consumer's rights under antidiscrimination or similar laws; and laws notifying consumers about credit information available from state authorities. Finally, state laws regarding the enforcement of the requirements of section 127(c) or (d) *or of any prohibitions against unfair and deceptive acts or practices (such as state "mini-FTC acts") also are not preempted.*

Truth in Lending; Credit and Charge Card Disclosures, 54 Fed. Reg. at 13,864 (emphasis added). The Official Staff Interpretation of § 1610(e) repeats this conclusion. *See* 12 C.F.R. pt. 226, supplement I, ¶ 28(d)(3) ("[S]tate laws concerning the enforcement of the requirements of §§ 226.5a and 226.9(e) *and state laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted.*") (emphasis added).

3. Petitioner Cross Country Bank ("CCB") is a financial institution chartered by the State of Delaware. Pet. App. 2a.[3] It issues credit cards targeted at the sub-prime credit market, that is, consumers who generally would not qualify for credit under traditional underwriting guidelines. Pet. App. 2a. The Attorney General, on behalf of the People of the State of New York, initiated a proceeding against CCB on March 28, 2003, alleging fraud, deceptive business practices, false advertising, and illegal activities in the marketing and sale of CCB's credit card services, in violation of New

3. "Pet." refers to the Petition for a Writ of Certiorari. "Pet. App." refers to the Appendix to the Petition.

York Executive Law § 63(12) and General Business Law §§ 349 and 350. Pet. App. 2a.[4]

The People alleged that CCB's credit card solicitations had, among other things, deceived consumers as to the credit limits they would receive, the amount of available credit upon card initiation, and their enrollment in third-party membership benefits programs. For example, CCB told consumers that they were "pre-approved" for a credit limit "up to" either $2,500 or $1,000, but the credit actually provided was as low as $350, and in some cases the accumulation of initial fees — which were treated as charges against the available balance — immediately depleted available credit by 40% or more. Pet. App. 2a-3a. Moreover, unbeknownst to most consumers, CCB often automatically enrolled them in third-party membership benefits programs for which they were immediately assessed fees. Pet. App. 4a & n.5.

The People also alleged that CCB's solicitations for its "secured" card were fraudulent.[5] The advertisements for the secured card touted in large type on the banner "no late fees" and "no collection calls," but the fine print near the bottom revealed that such fees could be

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4. The Petition also alleged abusive collection practices by CCB's credit card servicer, Applied Card Systems, Inc., a corporation under common ownership and control with CCB. *See* Pet. App. 4a-5a, 58a-59a. ACS has not sought certiorari, and the collection claims are not at issue here.

5. The card was "secured" by funds on deposit in savings accounts maintained by CCB.

imposed and collection calls could be made in certain circumstances. Pet. App. 4a.[6]

By order dated February 11, 2004, the New York trial court dismissed all but two of CCB's affirmative defenses. Pet. 5a-6a.[7] In its motion to reargue the February 11 order, CCB asserted for the first time that TILA preempts the People's deceptive practices claims against CCB. Pet. App. 6a. On May 28, 2004, following oral argument, the trial court denied CCB's motion to reargue and rejected CCB's preemption claim. Pet. App. 6a.

On June 24, 2004, after reviewing "volumes of evidentiary proof," including more than 100 pages of applications and solicitation materials and more than 200 consumer complaints and affidavits, the trial court entered partial judgment for the People, finding that CCB had, among other things, "'repeatedly and persistently' engaged in fraud, deception and false advertising in connection with its credit card solicitations." Pet. App. 6a.

The trial court permanently enjoined CCB, as relevant here, "from engaging in future fraud, deception, and false advertising with respect to: credit

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6. In fact, late fees could be imposed and collection calls made in the usual circumstances: payment past due, account over-limit, or depletion of the savings account securing the card. *See* Supplemental Appendix 5a-6a.

7. The trial court sustained CCB's statute of limitations and res judicata defenses to a portion of the People's claims. Pet. App. 5a-6a.

limits, initially-available credit, [and] late fees and collection calls concerning secured credit card accounts." Pet. App. 6a-7a. The court also enjoined CCB from automatically enrolling consumers in a third-party membership benefit program without their express consent. Pet. App. 7a.

The trial court's liability and injunctive order were affirmed on appeal, including its rejection of CCB's TILA preemption defense. Pet. App. 7a, 51a-59a. In rejecting CCB's argument that its solicitations as of mid-2001 corrected any problems as to credit limits, the Appellate Division found that a reasonable consumer would still be misled into "believing that the 'up to' amount boldly displayed on the solicitation letter was representative of a likely amount that a consumer would receive," and that "at all times, it appeared that the confusion was purposefully fostered by [CCB's] telemarketers." Pet. App. 56a.[8]

On January 19, 2006, the trial court entered an order granting restitution and penalties. Pet. App. 7a. The Appellate Division affirmed the remedial order in part, and reversed in part. Pet. App. 7a, 59a; *People v. Applied Card Sys., Inc.*, 41 A.D.3d 4 (2007).

4. On June 26, 2008, the New York Court of Appeals affirmed the Appellate Division's orders in their entirety. Pet. App. 1a-29a. Relevant to this petition, the Court of Appeals held that TILA does not preempt the People's fraudulent and deceptive practices claims. The Court of Appeals explained that "New York's Executive Law and

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8. In petitioning for review by this Court, CCB continues to challenge this finding of fact by the state court. *See* Pet. 16.

Consumer Practice Act, collectively, do not require [CCB] to disclose anything," but "simply require that they refrain from fraud, deception, and false advertising when communicating with New York consumers." Pet. App. 10a-11a.

To resolve the preemption question, the Court of Appeals looked to Congress's intent as manifested in the text of the express preemption provision at issue. Pet. App. 8a-17a. The Court of Appeals also considered § 1610(e)'s legislative history and the Board's interpretation of the provision, all of which expressly confirm that § 1610(e) does not preempt state deceptive practices claims. Pet. App. 17a-22a.

Looking first to the text of § 1610(e), the Court of Appeals concluded that § 1610(e) preempts only those state laws that relate to the disclosure of information in credit card solicitations and applications "'subject to the requirements of section 1637(c).'" Pet. App. 10a (quoting 15 U.S.C. § 1610(e)). Preemption is thus "limited . . . to laws that purport to alter the format, content, and manner of the TILA-required disclosures and those that require credit issuers to affirmatively disclose specific credit term information *not embraced by TILA or Regulation Z.*"[9]

9. The Court of Appeals rejected the People's alternative argument that § 1610(e) preempts only those state laws that require disclosure of a credit term for which there exists a specific TILA disclosure requirement. TILA does not currently require that credit card solicitations disclose credit limits or available credit. *See* Pet. App. 21a n.14. Thus, the People argued below that § 1610(e) should not be read to preempt the People's deceptive practices claims involving credit limits or available credit, even if those claims did arguably require disclosure of credit limits or available credit — which they do not.

Pet. App. 10a (emphasis added). In support of this conclusion, the Court of Appeals cited the rulemaking accompanying the FCCCDA amendment to Regulation Z, which explains that "'State laws relating to the terms of credit required to be disclosed or the manner in which such terms must be disclosed are preempted.'" Pet. App. 10a (quoting Truth in Lending; Credit and Charge Card Disclosures, 54 Fed. Reg. at 13,863). The Court of Appeals also considered the Official Staff Interpretation of § 1610(e), which makes the same point. Pet. App. 10a (citing 12 C.F.R. pt. 226, supplement I, ¶ 28(d)(1)).

Accordingly, the Court held that the fraud and deceptive practices in this case are not preempted, because New York's consumer protection statutes do not require CCB to disclose anything; they "simply require that [CCB] refrain from fraud, deception, and false advertising when communicating with New York consumers." Pet. App. 10a-11a. While the Court of Appeals recognized that the verified petition makes reference to the fact that many consumers were unaware of the manner in which certain credit terms were applied against their accounts, it found determinative the fact that the People did not challenge the substance or sufficiency of CCB's TILA disclosures and obtained no relief based upon consumers' purported lack of awareness. Pet. App. 12a.[10]

The Court of Appeals rejected CCB's argument that § 1610(e)'s preemption of state laws "relating to" the disclosure of information in consumer credit card

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10. CCB's professed compliance with TILA, *see* Pet. 15, is not only irrelevant to this case, but has never been adjudicated.

solicitations requires preemption of "every state law that could potentially touch upon any credit information that [CCB] might choose to include in their credit card applications and solicitations." Pet. App. 10a. The Court of Appeals did not find support for CCB's claim in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-90 (1992), a case involving preemption under the Airline Deregulation Act of 1978 ("ADA"), whose express preemption clause also uses the phrase "relating to" to circumscribe its preemptive scope. Pet. App. 13a-15a. While "relating to" does "'express a broad pre-emptive purpose,'" the Court of Appeals acknowledged, the phrase is not without limit. Pet. App. 13a (quoting *Morales*, 504 U.S. at 383); *see also* Pet. App. 13a (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008)). The Court of Appeals pointed out that this Court has "'cautioned against an "uncritical literalism" that would make preemption turn on "infinite connections,"'" Pet. App. 13a-14a (quoting *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001)), and thus has interpreted the phrase to require "'a connection with, or reference to' the subject-matter set forth in a particular preemption clause." Pet. App. 13a (quoting *Morales*, 504 U.S. at 384). "[N]o preemption occurs," the Court of Appeals added, "if the effect of the relief sought is 'too tenuous, remote or peripheral.'" Pet. App. 14a (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983) (external citation omitted)).

Applying interpretive guidance from *Morales*, *Rowe*, *Travelers*, *Egelhoff*, and *Shaw*, the Court of Appeals concluded that the People's claims do not "relate" to

the disclosure of federally mandated information in credit card solicitations. Pet. App. 13a-16a. "Instead, they relate to the inclusion in these materials of certain fraudulent and deceptive misinformation — none of which is even addressed by the federal disclosure scheme." Pet. App. 14a. The People's claims do not reference or connect with TILA disclosure requirements in part because the People's entitlement to relief is based not on CCB's obligation to disclose credit terms, but on "'a more general obligation — the duty not to deceive.'" Pet. App. 16a (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-29 (1992)). Moreover, neither the People's claims nor the relief they were granted have any effect on TILA-required disclosures. Pet. App. 15a. The trial court's order did not mandate any alteration of or addition to the required disclosures. Pet. App. 15a. Rather, its injunction simply prevents CCB from affirmatively misrepresenting the nature of credit terms. Pet. App. 15a.

For essentially the same reason, the Court of Appeals held that the People's claims in this case would not disrupt the federal scheme of uniform disclosure mandated under TILA. The Court noted that the relief granted below does not alter or impose any additional disclosure requirements upon CCB; it merely precludes them from making fraudulent and deceptive statements regarding credit terms. Pet. App. 16a-17a. While finding that point dispositive, the Court of Appeals added that any "indirect economic influence" upon CCB's solicitation practices resulting from the relief accorded below is not sufficient to overcome the presumption against preemption of state law. Pet. App. 16a (quoting *Travelers*, 514 U.S. at 664 ("although ERISA contains

a broad, 'relating to' preemption clause," ERISA did not preempt New York law imposing surcharges on all insurers "'because the law did not impose a substantive coverage requirement'")).

The Court of Appeals distinguished the holding in *Morales*, which found the state law at issue preempted by the ADA, based on the particular relationship between the federal and state laws at issue in that case. Pet. App. 14a-15a. The Court of Appeals also rejected CCB's reliance on this Court's decision in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), because the scope of preemption under § 1610(e) is substantively different from that under the Medical Device Act at issue in *Riegel*, and because unlike in *Riegel*, the People's claims in this case will not disrupt the federal scheme at issue. *See* Pet. App. 16a-17a.

The Court supported its textual analysis by looking to the legislative history of § 1610(e), through which it confirmed that Congress did not intend TILA to provide the sole protection against fraudulent or deceptive marketing practices, or to preempt state deceptive practices claims in this area. Pet. App. 17a-20a. The Senate Banking Committee Report pointedly states that TILA does not preempt "'the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices.'" Pet. App. 20a (quoting S. Rep. No. 100-259, at 9). The Court of Appeals noted that New York's consumer protection laws "comprise, of course, just such a 'mini-FTC act.'" Pet. App. 20a (citing *Oswego*, 85 N.Y.2d at 26; *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 323-24 (2002)).

The House Conference Report also anticipates that States would continue to enforce their unfair and deceptive trade practices acts, and even obtain "a specific disclosure beyond those specified in [§ 1637(c)] in the settlement or adjudication of a specific case or cases." Pet. App. at 19a (quoting H.R. Conf. Rep. No. 100-1069, at 22). The Conference Report explains that § 1610(e) preempts "'State credit and charge card disclosure laws,'" identifying as an example a California statute "contain[ing] application and solicitation disclosure requirements very similar to TILA's." Pet. App. 18a (quoting H.R. Conf. Rep. No. 100-1069, at 22).

After considering the statutory text and its legislative history, the court of appeals gave deference to the views of the Board of Governors of the Federal Reserve System, the agency charged with administering TILA. *See* Pet. App. 20a (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980)). The Board's views confirmed the Court of Appeals' statutory analysis, and mirrored the views of the Senate Banking Committee and House Conference Reports. The Board's rulemaking accompanying its revisions to Regulation Z provide that "'any prohibitions against unfair and deceptive acts or practices (such as state "mini-FTC acts") . . . are not preempted.'" Pet. App. 20a (quoting Truth in Lending; Credit and Charge Card Disclosures, 54 Fed. Reg. at 13,864). The Board's Official Staff Interpretations state the same: "'[S]tate laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted.'" Pet. App. 20a (quoting 12 C.F.R. pt. 226, supplement I, ¶ 28(d)(3)).

The single dissenting judge would have found the People's deceptive solicitation claims preempted by TILA. First, the dissent mistakenly described the majority opinion as limiting preemption to circumstances in which a specific TILA disclosure requirement governs the credit term alleged to be deceptive. *See* Pet. App. 30a, 39a-40a & n.2, 47a-48a. The dissent equates the majority's view with conflict preemption, Pet. App. 30a, 40a, 48a, apparently believing that the majority found no preemption in this case because TILA does not require disclosures for credit limits or available credit, Pet. App. 39a n.2. In this respect, the dissent is simply mistaken, as the majority actually held that preemption is "limited to [state] laws that purport to alter the format, content, and manner of the TILA-required disclosures *and those that require credit issuers to affirmatively disclose specific credit term information not embraced by TILA or Regulation Z.*" Pet. App. 10a (emphasis added).

The dissent's primary point of contention, however, was with the majority's interpretation of the phrase "relating to" in § 1610(e). *See* Pet. App. 47a-48a (citing *Morales*, 504 U.S. at 383). The dissent would have found, for purposes of TILA's special preemption rule, that a negative duty to refrain from making a deceptive or fraudulent statement regarding a term of credit "relates to" an affirmative obligation to disclose that credit term because, in the dissent's view, additional or different disclosures are the sole remedy for deceptive or fraudulent credit card solicitations. *See* Pet. App. 45a-46a, 48a-49a. For this reason, the dissent would have found the federal scheme for enhanced credit shopping disrupted by the People's deceptive practices claims,

and the People's claims preempted. *See* 47a-49a (citing *Riegel*, 128 S. Ct. at 1008).

The dissent dismissed the majority's reliance on the regulatory and legislative materials that demonstrate Congress's intent to leave undisturbed state deceptive practices acts. Pet. App. 42a-45a. Specifically, the dissent asserted that the relied-upon language in the Board's rulemaking was taken out of context and was meant to apply "*solely* in the context of enforcing TILA and Regulation Z." Pet. App. 43a (emphasis in original). The portion of the rulemaking quoted and emphasized by the dissent provides: "'*Finally, state laws regarding the enforcement of the requirements of section 127(c) or (d) or of any prohibitions against unfair and deceptive acts or practices (such as state "mini-FTC acts") also are not preempted.*'" Pet. App. 43a (quoting 54 Fed. Reg. at 13,863-64) (emphasis added in dissenting opinion). The dissent also relied on the House Conference Report and cited the Official Staff Interpretations, without explaining or even mentioning the Senate Banking Committee Report. *See* Pet. App. 43a.[11]

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11. The Senate Banking Committee Report does not mention TILA enforcement, simply stating that § 1610(e) "applies to State credit card disclosure laws, not to general disclosure statutes such as State retail installment sales acts and State plain language statutes. *Nor does it apply to the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices.*" S. Rep. No. 100-259, at 9 (emphasis added).

REASONS FOR DENYING THE PETITION

The New York Court of Appeals' ruling that TILA does not preempt the People's deceptive practices claims against CCB presents no issues worthy of this Court's review. The Court of Appeals broke no new ground in its decision, but rather applied well-established preemption principles to determine the effect of a straightforward preemption clause. CCB points to no conflict with any federal or state court, which is not surprising considering that both the legislative history of the FCCCDA and the federal agency charged with administering TILA expressly contemplate the use of state deceptive practices laws to prohibit fraudulent and deceptive solicitations by credit card companies.

Nor does CCB's desire for uniform credit card disclosures provide any additional ground for review. The deceptive practices claims brought under state law in this case could equally have been brought by the People under the FTC Act, which is not displaced by TILA, nor does CCB claim that it is. Thus, state laws against deceptive practices do not introduce any threat to uniformity that is not already presented by the FTC Act.

CCB simply disagrees with the outcome of this case, and seeks no more than error correction, but even this has no merit.

1. CCB first argues that this Court should grant review because the Court of Appeals ignored this Court's holdings regarding preemption. But contrary to CCB's argument, the Court of Appeals' decision does not

contradict this Court's holdings. The Court of Appeals faithfully followed this Court's precedents in determining whether and to what extent Congress intended to preempt state law, *see* Pet. App. 8a-12a, and carefully analyzed the pertinent federal and state laws, and the relevant legislative history and regulatory background of TILA.

Far from acting "in derogation of this Court's holdings" regarding preemption, the Court of Appeals carefully explained why the precedents invoked by CCB, notably *Riegel* and *Morales*, do not apply here. Thus, the Court of Appeals explained that the federal statute at issue in *Riegel* (the Medical Device Amendments Act of 1976) was different in critical respects from TILA, thereby leading to a different conclusion on preemption. *See* Pet. App. 16a-17a (discussing *Riegel*, 128 S. Ct. 999). CCB does not identify any specific legal principle in *Riegel* that the Court of Appeals failed to follow, nor could it, since the issues in *Riegel* were heavily case-specific: whether the premarket approval process for medical devices constitutes a federal requirement, and whether common law tort claims can impose state "requirements" applicable to the medical device that are different from the federal requirement. *See Riegel*, 128 S. Ct. at 1006-07. CCB's dispute with the Court of Appeals' treatment of *Riegel* is simply that the court did not find preemption, as the *Riegel* Court did. *See* Pet. 23-25.

Nor did the Court of Appeals "refuse[] to abide by this Court's decisions [such as *Morales*] that have repeatedly held that the phrase 'relating to' in preemption clauses is to be given its broad meaning,"

as CCB asserts. Pet. 30. To the contrary, the Court of Appeals applied this Court's interpretation of the phrase from other statutory contexts, relying on many of the same cases cited in the petition, and applying the "connection with or reference to" standard advocated by CCB. *Compare* Pet. App. 13a-14a, *with* Pet. 30. Again, CCB's complaint is with the outcome: the Court of Appeals found that, "[q]uite simply, [the People's] claims do not relate to the disclosure of federally-mandated information in credit card applications or solicitations." Pet. App. 14a.

Nor does the Court of Appeals' purported reliance on the presumption against presumption, *see* Pet. 25, provide reason for this Court to grant review of the decision below. Although the well-established presumption against preemption was recognized by the Court of Appeals, *see* Pet. App. 8a (citing *Travelers Ins. Co.*, 514 U.S. at 654; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)), the Court of Appeals did not actually rely on the presumption to decide this case. Instead, the Court of Appeals independently reviewed the text of § 1610(e), finding it dispositive that "[the People's] success in this case does not force [CCB] to make any alterations to their section 1637(c) disclosures or to affirmatively disclose any additional credit terms." Pet. App. 16a. Only then did the Court of Appeals comment that "[i]n any event," the presumption against preemption could not be overcome by the "indirect economic influence" CCB cited as resulting from the relief accorded. Pet. App. 16a. The Court of Appeals confirmed its analysis not through a presumption, but by looking to the legislative history of the FCCCDA and the views of the Board of Governors of the Federal

Reserve System, which expressly provide that the FCCCDA does not preempt state deceptive practices laws. Pet. App. 17a-22a. Thus, the Court of Appeals did not "intrude on the regulatory scheme established by Congress" in contravention of any precedents of this Court, as alleged by CCB, *see* Pet. 28, but faithfully followed both congressional intent and the Board's guidance, Pet. App. 20a.[12]

2. CCB's concern that the decision below will "destroy the national uniformity established by TILA," Pet. App. 34, does not merit this Court's review. Contrary to CCB's assertion, there is abundant evidence that an action such as the one here was expressly contemplated by Congress.

As the Court of Appeals correctly held, the legislative history and regulatory background of the FCCCDA confirm that Congress did not intend for TILA to provide a consumer's only protection against fraudulent and deceptive marketing practices in credit and charge card solicitations. *See* Pet. App. 17a-22a. Those materials expressly state that the FCCCDA does not preempt state unfair or deceptive practices laws. *See* S. Rep. No. 100-259, at 9; H.R. Conf. Rep. No. 100-

12. The cases cited by CCB do not support its argument that no presumption against preemption could apply in this case. See Pet. 25 (citing *Lohr*, 518 U.S. at 485; *Rowe*, 128 S. Ct. at 998). This Court, in interpreting the express preemption clause at issue in *Lohr*, expressly relied on the presumption against preemption. *See* 518 U.S. at 485, 494. While *Rowe* did not directly address the question, its analysis suggests that any presumption would have been overcome because the preemption question was not "borderline." *Rowe*, 128 S. Ct. at 998.

1069, at 21; 54 Fed. Reg. at 13,864. Moreover, the deceptive practices claims brought in this case under state law could equally have been brought under the federal FTC Act. *See, e.g., FTC v. Febre*, 1996 U.S. Dist. LEXIS 9487, *7-*11 (N.D. Ill. July 3, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997). It is thus evident that Congress did not regard TILA's goals as inconsistent with state enforcement of laws against deceptive credit card solicitations — whether those laws were enacted by Congress or by the States. The Board, too, has consistently concluded that § 1610(e) does not preempt state unfair or deceptive practices laws.[12]

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13. The independence of disclosure requirements and deceptive practices claims is further confirmed by certain amendments proposed by the Board jointly with two other federal financial regulatory agencies pursuant to their authority under the FTC Act to prevent unfair or deceptive practices. *See* Pet. App. 21a n.14. The proposed rule recognizes that disclosure problems associated with credit cards "'have constituted deceptive practices under applicable standards of the FTC Act.'" Unfair or Deceptive Acts or Practices, 73 Fed. Reg. 28,904, 28,924 n.59 (proposed May 19, 2008) (quoting OCC Advisory Letter 2004-4, at 2-3 (Apr. 28, 2004), *available at* 2004 OCC CB LEXIS 31, at *7). The OCC Advisory Letter cited in the proposed rule explains that

> [i]n addition to complying with the technical disclosure and other requirements of [TILA] and the Truth in Savings Act, issuers of these [credit card] products must be careful to ensure that their marketing solicitations, disclosure documents, and other materials provided to consumers do not violate the FTC Act's prohibition against unfair or deceptive acts or practices.

OCC Advisory Letter 2004-4, at 4, 2004 OCC CB LEXIS 31, at *10.

Moreover, Congress has specifically authorized States to enforce TILA's disclosure requirements, thus evincing no concern over state enforcement generally. The only thing a State may not do in this area is to impose an affirmative disclosure requirement, which New York has not done.

3. CCB's petition rests at bottom on two fundamental mistakes. First, CCB mistakenly reads the decision of the Court of Appeals as imposing a regime of conflict preemption only, when in fact the Court found preemption not only of conflicting state laws but also of all affirmative disclosure requirements, even in the absence of actual conflict. CCB asserts that under the Court of Appeals' ruling, "when the Federal Reserve Board has not mandated a particular disclosure, the States to [sic] are free to supplement TILA's requirements until such a time as the Federal Reserve Board, in fact, does act." Pet. 32-33. In fact, however, the Court of Appeals actually held that § 1610(e) preempts both "laws that purport to alter the format, content, and manner of the TILA-required disclosures *and those that require credit issuers to affirmatively disclose specific credit card information not embraced by TILA or Regulation Z*." Pet. App. 10a (emphasis added).

Second and more fundamentally, CCB ignores or overlooks the inherent distinction between a disclosure requirement and a prohibition against fraudulent statements. The bank mistakenly assumes that the only remedy for a fraudulent or deceptive solicitation is additional or different disclosures, and argues that a deceptive practices claim is therefore tantamount to a

disclosure requirement, when the facts of this case reveal that not to be the case.

For example, CCB's solicitation for its secured card is fraudulent and deceptive in that it expressly states at the top, in bold, that no late fees will be charged or collection calls made when in fact, late fees are charged and collection calls made. Lower down on the solicitation, in fine print, the existence of fees and the practice of making collection calls is revealed, but the trial court found and the appellate court affirmed that a reasonable consumer would expect to receive a card with no fees and no collection calls.[14] CCB failed to provide that.

The deceptive practices claim is not a disclosure requirement at all, but simply a requirement that the Bank provide consumers what it promised them. By this claim the People ask the Bank either to stop promising no fees and collection calls, or to stop imposing fees and making calls. And if the Bank chooses to change its solicitation rather than its practices, the Bank is not required to add any new disclosures, but only to delete the false or deceptive statements. The Board commentary explains this point. The Official Staff Interpretations provides that "state laws regulating the terms of credit and charge card accounts are not

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14. The standard for deception under New York law is "an objective standard which asks whether the 'representation or omission [was] likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Matter of Food Parade, Inc. v. Office of Consumer Affairs*, 7 N.Y.3d 568, 575 (2006) (citing *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 344 (1999) (internal quotation marks and citations omitted).

preempted, ... and state laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted." 12 C.F.R. pt. 226, supplement I, ¶ 28(d)(3); *see also* 54 Fed. Reg. at 13,864 (same).

CCB attempts to explain away the unanimous conclusion of the Senate Banking Committee, the House Conference Report, and the Board that § 1610(e) does not preempt state deceptive practices laws by suggesting that such laws are outside the preemption bar only when they are used to enforce the requirements of TILA and Regulation Z. Pet. 32. This view was adopted by the dissent below. *See* Pet. App. 42a-43a. It is, however, inconsistent with both the text and purpose of the legislative and regulatory materials at issue, which expressly exempt state deceptive practices laws from preemption, without any such limitation. *See supra* at 3-6.

In sum, the decision below applies settled preemption principles in a straightforward and correct manner, and presents no issues meriting this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL APPENDIX

N.Y. General Business Law § 349

Deceptive acts and practices unlawful

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(b) Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.

(c) Before any violation of this section is sought to be enjoined, the attorney general shall be required to give the person against whom such proceeding is contemplated notice by certified mail and an opportunity to show in writing within five business days after receipt of notice why proceedings should not be instituted against him, unless the attorney general shall find, in any case in which he seeks preliminary relief, that to give such notice and opportunity is not in the public interest.

(d) In any such action it shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts.

(e) Nothing in this section shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine or other form of printed advertising, who broadcasts, publishes, or prints the advertisement.

(f) In connection with any proposed proceeding under this section, the attorney general is authorized to take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules.

(g) This section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state, and shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry.

(h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this

section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

N.Y. General Business Law § 350.

False advertising unlawful

False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

N.Y. Executive Law § 63(12)

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of

section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.

5a

Supplemental Appendix

☑ SECURED GOLD CARD ONLINE APPLICATION

TERMS AND CONDITIONS OF OFFER

Annual Percentage Rate (APR) for Purchases	[redacted]
Other APRs	Cash Advance APR: [redacted] Late Payer APR: [redacted] see explanation [redacted] below
Variable-Rate Information	Your APR may vary. The APR for purchases and Cash Advances is determined by adding [redacted] to the Prime Rate (but not lower than 9.99%). The Late Payer APR for both purchases and Cash Advances is determined by adding [redacted] to the Prime Rate (but not lower than 9.99%).
Grace Period for Repayment of Balances for Purchases	[redacted]
Method of Computing the Balance for Purchases	[redacted] Average Daily Balance (including new purchases)
Monthly Maintenance Fee	[redacted] month ($2.00 Quarterly)
Minimum Finance Charge	[redacted] .50
Account Origination Fee (one-time fee)	[redacted]

Cash Advance Fee: the greater of $5.00 or 5% of each Cash Advance which includes, but is not limited to, ATM and convenience check usage; Late Payment Fee: $[redacted]5 if your credit limit is greater than $1,000, [redacted] or $35 if your credit limit is greater than $1,000. If any minimum payment is not received by the last day of the billing cycle in which it was due then the late payer rate applies and will be effective beginning the first day of the next billing cycle.

*The Prime Rate used in determining the variable APRs is the highest one reported in the "Money Rates" column of The Wall Street Journal on the last business day of the month. Variable APRs are based on the 4.25% Prime Rate as of January 31, 2003.

The information concerning the costs of credit is accurate as of February 20, 2003. This information may have changed after that date. To find out what may have changed, write to us at Cross Country Bank, Correspondence Department, P.O. Box 310711, Boca Raton, FL 33431-0711.

Approval and Credit Limit Terms: By submitting your application and money you are requesting a Secured Visa® Gold account ("Account") and a Statement Savings account ("Deposit"). Your Account will have an initial credit limit that is at least equal to the amount of money in your Deposit. An Account and Deposit may be approved if CCB can verify your information, you meet our criteria bearing on creditworthiness, your deposit is not returned unpaid, you are at least 18 years old, you live in the 50 United States or the District of Columbia, you submit a completed application, you have not requested credit from CCB in the past six months, and you do not have a CCB credit account.

Statement Savings Account Information and Disclosures: You are required to submit money in U.S. Dollars in order to open a Deposit, which will act as Cross Country Bank's security deposit for the Account. The interest rate on the Deposit is 3.00% with an ANNUAL PERCENTAGE YIELD* ("APY") of 3.04%. The APY is accurate as of February 20, 2003, however, the rate may change after the Deposit is opened at our discretion. Interest will be compounded monthly and credited monthly. If you close your Deposit before interest is credited you will not receive the accrued interest. Interest is calculated using the average daily balance method, which applies a periodic rate to the average daily balance in the Deposit for the period. Interest begins to accrue no later than the business day we receive credit for deposits made. The minimum balance required to open the Deposit is $200. Fees could reduce the earnings on the deposit. You may not access Deposit funds as they are used to determine your credit limit and/or serve as collateral for your Account. The Deposit will be owned jointly with the right to survivorship if more than one person applied for the Deposit and related Account. You will be sent Deposit statements not less than quarterly. We will promptly return your funds if a Deposit is not opened for any reason. MEMBER FDIC

Pledge And Assignment Of Statement Savings Account: By submitting your application and money, you authorize CCB to open a Deposit in your name as collateral for the Account, if approved. In consideration of CCB's agreement to establish an Account for your use, you hereby pledge and assign and grant CCB a security interest in the Deposit and any sums you may later add to the Deposit to us, including interest you earn to secure payment of all obligations on the Account. This means your Deposit secures all sums you [redacted] owe us on [redacted] your credit account. You understand that the Deposit is subject to the Deposit agreement and the Security section of the Account agreement and other documentation that will be sent to you. Further, you understand that the Deposit must remain with CCB as long as it secures your Account, that CCB need not permit any withdrawals from the Deposit and that if you

BEST AVAILABLE COPY

Supplemental Appendix

Notice: This application to establish a credit card account ("Account") and statement savings account ("Deposit") is made available by Cross Country Bank of Wilmington, DE ("CCB"). If you accept or use an Account, you do so subject to the terms of this application and the CCB Credit Card Agreement and Statement Savings Account Rules and Regulations, as they may be amended, which will be sent to you ("Agreement"). **The Agreement and terms of your accounts, including the APR, are subject to change. The Agreement includes a binding arbitration provision, which may replace your right to go to court, including the right to a jury and the right to participate in a class action or similar proceeding.** Any changes that you make to the application will have no effect. This offer, and any resulting Account or Deposit, is subject to Delaware and federal law. **You agree that:** You will be responsible for and pay for all charges and fees incurred on any account granted according to the Agreement, all statements made and information provided are true; CCB, its affiliates and service or marketing vendors may monitor and/or record any conversations with you; your Account will only be used for personal, family or household purposes; CCB is authorized to verify all information you provide; CCB may obtain consumer credit reports related to this request for credit and for updates, renewals, extensions of credit and review or collection of your Account; CCB is authorized to furnish information about you and your Account to consumer reporting agencies and others who help service your account. Upon request, CCB will tell you the name and address of each consumer credit reporting agency from which we obtained a consumer credit report about you.

fail to make any payments on your Account when they come due we may apply the Deposit to pay all that you owe on your Account without notice. This pledge and assignment shall be governed by Delaware Law.

* APY (Annual Percentage Yield) is the effective interest rate your money will earn if it remains on deposit for a full year at the same annual interest rate, and if all of the principal and interest are left in the Deposit.

New York Residents: May contact the New York State Banking Department at 1-800-518-8866 to obtain a comparative listing of credit card rates, fees and grace periods. **Ohio Residents:** The Ohio law against discrimination requires that all creditors make credit equally available to all credit worthy customers, and that credit reporting agencies maintain separate credit histories on each individual upon request. The Ohio civil rights commission administers compliance with this law. **California Residents:** Married applicants may apply for separate credit. **Married Wisconsin Residents:** No provision of any marital property agreement, unilateral agreement or court order applying to marital property will adversely affect a creditor's interests unless prior to the time credit is granted, the creditor is furnished with a copy of the agreement, statement or court order or has actual knowledge of the provision. Married Wisconsin residents must furnish the name and address of your spouse to Cross Country Bank, Correspondence Department, P.O. Box 310711, Boca Raton, FL 33431-0711.

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Equal Opportunity Lender

115

No. 08-405

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CROSS COUNTRY BANK, INC.,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK, by ANDREW CUOMO, Attorney General of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... ii

PRELIMINARY STATEMENT..... 1

ARGUMENT 3

POINT I—
THE COURT OF APPEALS REFUSED TO FOLLOW THIS COURT'S HOLDINGS..... 3

POINT II—
THE COURT OF APPEALS' HOLDING UNDERMINES CONGRESS' GOAL OF NATIONAL UNIFORMITY..... 6

POINT III—
THE COURT OF APPEALS MISCONSTRUED THE SCOPE OF SECTION 1610(e)..... 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases: PAGE

Altria Group, Inc. v. Good,
No. 07-562, 2008 WL 5204477
(U.S. Dec. 15, 2008) 5

*Arkansas Electric Cooperative v.
Arkansas Public Services Commission*,
461 U.S. 375 (1983) 12

BedRoc Ltd., LLC v. United States,
541 U.S. 176 (2004) 8

*Engine Manufacturers Ass'n v.
South Coast Air Quality
Management District*,
541 U.S. 246 (2004) 5

FTC v. Febre,
No. 94 C 3625, 1996 U.S. Dist. Lexis
9487 (N.D. Ill. July 3, 1996),
aff'd, 128 F.3d 530 (7th Cir. 530) 6

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 3, 4

*Norfolk & Western Railway Co. v. American
Train Dispatchers' Ass'n*,
499 U.S. 117 (1991) 8

Reigel v. Medtronic, Inc.,
128 S. Ct. 999 (2008)..... 5

PAGE

Rowe v. New Hampshire Motor Transport Ass'n, 128 S. Ct. 989 (2008) 3

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 3

United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439 (1993) 7

United States v. Locke, 529 U.S. 89 (2000) 12

Whitfield v. United States, 543 U.S. 209 (2005) 7

Statutes And Other Authorties:

15 U.S.C § 45(a)(2) 6

15 U.S.C. § 57a(f)(3) 6

15 U.S.C. § 1610(c) ..... *passim*

12 C.F.R. pt. 226, Supp. I, ¶ 28(d)(3) 8

134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988) 7, 8

Credit and Chrage Card Disclosures, 54 Fed. Reg. 13,855 (Apr. 6, 1989) 8-9

S. Rep. No. 100-259 (1987), *reprinted in* 1988 U.S.C.A.A.N. 3936 8

PRELIMINARY STATEMENT

The opposition of the Attorney General of the State of New York (the "Attorney General") to the Petition of Cross Country Bank ("CCB") underscores the importance of this Court's granting review of the New York Court of Appeals' decision eviscerating the total preemption set forth in Section 1610(e) of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1610(e). Contrary to the Attorney General's insistence, the Court of Appeals refused to follow two critical tenets of the Court's preemption jurisprudence. The Court of Appeals relied on a contrived distinction to evade this Court's holdings that preemption statutes using the phrase "relating to" are to be construed broadly. Similarly, the Court of Appeals insisted that the presumption against preemption should be employed to preserve the right of the Attorney General to impose additional disclosure requirements in direct contravention of Section 1610(e)'s express prohibition. The Attorney General fails to come forward with any principled justification for that decision.

Indeed, at the end of his opposition to this Petition, the Attorney General confesses to the relief that he really seeks. In response to the statute's express limitation restricting the right to apply State law, the Attorney General asserts that "both the text and purpose of the legislative and regulatory materials at issue . . . expressly exempt state deceptive practices laws from preemption, without any . . . limitation." *See* Attorney General's Brief at 25. This assertion tramples Section 1610(e)'s plain and unambiguous words, which are every use of state law is preempted "except that any State may employ or establish State laws for the purpose of enforcing the

requirements of [TILA]." The Court of Appeals erroneously upheld the Attorney General's obliteration of this limitation.

The Attorney General wrongly contends that the Court of Appeals' decision poses no threat to the national uniformity that Congress mandated when it amended TILA in 1988 and adopted Section 1610(e). Yet, the Court of Appeals has sanctioned the Attorney General's efforts to impose additional and different disclosures in credit card solicitations via the assertion of a claim for false and deceptive practices and to ignore the exclusive authority vested in the Federal Reserve Board. If not reversed, the Court of Appeals' ruling will invite every other State attorney general to use state law to impose state-specific disclosure requirements.

ARGUMENT

POINT I

THE COURT OF APPEALS REFUSED TO FOLLOW THIS COURT'S HOLDINGS

The New York Court of Appeals refused to abide by this Court's holding that, when Congress uses the phrase "relating to" in provisions such as Section 1610(e), it is "express[ing] a broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *accord Rowe v. N.H. Motor Transport Ass'n*, 128 S. Ct. 989, 995 (2008); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). The Attorney General responds that the Court of Appeals did follow those decisions, and that it instead concluded that the Attorney General's claims do not "relate" to disclosure obligations under TILA. *See* Attorney General's Brief at 20. This argument merely embraces the Court of Appeals' refusal to follow this Court's jurisprudence based on an immaterial and superficial factual distinction.

The Court of Appeals specifically concluded that *Morales* is not relevant because the preemption issue under TILA is too tenuous, remote or peripheral. App14a.[1] It claimed that "the reach of § 1610(e) is not as expansive" as the statutory preemption provision at issue in *Morales*. App15a. The Attorney General adopted this erroneous conclusion. *See* Attorney General's Brief at 14. In fact, the two preemption provisions are fundamentally identical.

In *Morales*, the National Association of Attorneys General issued guidelines concerning airline adver-

[1] "App" refers to the Appendix annexed to CCB's Petition.

tising, frequent flier programs and compensation policies for passengers yielding their seats on overbooked flights. A group of attorneys general, including the Attorney General of New York, threatened to use their deceptive practices statutes, such as Section 349 of the New York General Business Law (the "GBL"), to enforce their guidelines concerning airline advertising. *Morales*, 504 U.S. at 379-80. This Court held that the use of such statutes was preempted by the Airline Deregulation Act, which preempts any state law "relating to rates, routes, or services of any carrier . . . ." *Id.* at 383-84 (citation omitted). Just as the State's regulation of information provided in airline advertising relates to "rates, routes or services," the State's regulation of information provided in credit card solicitations, such as credit limits, likewise relates to "the disclosure of information" in credit card solicitations. *Id.*

Despite the fact that it was construing an express preemption provision, the Court of Appeals further erred by employing the presumption against preemption to distort Section 1610(e)'s meaning. *See* Petition at 25. The Attorney General wrongly contends that "the Court of Appeals did not actually rely on the presumption [against preemption] to decide this case." *See* Attorney General's Brief at 20.

To the contrary, the Court of Appeals specifically stated that its interpretation of Section 1610(e) was "guided by the 'starting presumption that Congress does not intend to supplant state law' unless its intent to do so is 'clear and manifest'." App8a-9a (citation omitted). Further, the court mischaracterized the order enjoining CCB's disclosure practices as having only "'indirect economic influence' upon [CCB's] solicitations practices," and proceeded

to hold that this impact "is not sufficient to overcome the presumption against preemption of state law." App16a.

The presumption against preemption has no role in this case. In an express preemption case, Congress' intent is beyond dispute, and a court may resort to the presumption only when there is more than one plausible reading of the statute's text. *See, e.g.*, *Altria Group, Inc. v. Good*, No. 07-562, 2008 WL 5204477 at *4 (U.S. Dec. 15, 2008);[2] *Reigel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008-09 (2008) (no grounds for narrowing the scope of preemption because "the statute itself speaks clearly to the point at issue"); *id.* at 1014 (Ginsburg, J., dissenting); *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) ("[O]ur interpretive method . . . neither invokes the 'presumption against preemption' to determine the *scope* of pre-emption nor delves into legislative history. Application of those methods, on which not all Members of this Court agree, demonstrably makes no difference to resolution of the principal question . . . ." (citation omitted, emphasis in original)). The Court of Appeals did not identify any

[2] The Court of Appeals' decision is also inconsistent with this Court's recent ruling in *Altria*. The Atria Court employed the presumption against preemption only because the provision at issue in the statute was susceptible to more than one meaning. 2008 WL 5204477 at *4. The preemption provision in that statute differs markedly from Section 1610(e). It applied only to state law requirements "based on smoking and health." The Court specifically contrasted that provision to the type of provision such as Section 1610(e): "Unquestionably, the phrase 'relating to' has a broader scope than the Labeling Act's reference to rules 'based on smoking and health . . . .'" *Id.* at *8 (citations omitted). The Court applied that narrower scope when it held that the fraud claims were not preempted. *Id.* at *8.

ambiguity in the text, as it was required to do to invoke the presumption, and instead used the presumption as a pretext for disregarding Section 1610(e)'s plain meaning and the Congressional mandate of national uniformity.

POINT II

THE COURT OF APPEALS' HOLDING UNDERMINES CONGRESS' GOAL OF NATIONAL UNIFORMITY

The Attorney General argues that the Court of Appeals' ruling is not inconsistent with Congressional goals for uniform national disclosure requirements because (i) "this case could equally have been brought by the [Attorney General] under the FTC Act, which is not displaced by TILA," and (ii) Congress intended for the States to supplement TILA's disclosure requirements through the application of false and deceptive practice statutes such as Section 349 of the GBL. *See* Attorney General's Brief at 18, 21-22. The first argument is patently erroneous, and the second is inconsistent with both Section 1610(e) as well as any legitimate reading of its legislative history.

First, the States have no authority to enforce the FTC Act's prohibition of unfair and deceptive practices. *See* 15 U.S.C § 45(a)(2) (granting enforcement power to the FTC and, with respect to banks, to the federal banking agencies designated in 15 U.S.C. § 57a(f)(3)). Moreover, the sole authority cited by the Attorney General, *FTC v. Febre*, No. 94 C 3625, 1996 WL 396117 (N.D. Ill. July 3, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997), did not involve an enforcement proceeding against credit card solicitation disclosures, but was a run of the mill FTC case

concerning the marketing of a get-rich scheme. *See* Attorney General's Brief at 22.

Second, the Attorney General's reliance on the statute's legislative history is improper. Section 1610(e) unambiguously prohibits any state action other than "for the purpose of enforcing the requirements of [Section 1632 and Section 1637(c), (d), (e) and (f) of TILA]." The Attorney General may not subvert the statute's plain meaning by resorting to legislative history. *See Whitfield v. U.S.*, 543 U.S. 209, 215-17 (2005); *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 n.11 (1993).

Further, the complete legislative history demonstrates that the Attorney General's use of it is wrong. Congress balanced the competing interests of consumers and banks, and national uniform regulation of credit card solicitations was the result. *See* Petition at 36 (quoting remarks of Representative Schumer, 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988)). The legislative history makes clear that Congress amended TILA in order to establish national uniformity and to eliminate all state regulatory authority. For example, Representative St. Germain explained in the House debate: "Some of us, frankly, had hoped that we could avoid a flat preemption of State laws and allow the so-called truth-in-lending approach to apply—an approach which would allow States to enact credit card disclosure laws so long as they were not inconsistent with the Federal Law. Ultimately, however, we settled on a compromise which added ancillary fees which brought the provisions of this legislation to the outer limits of the strongest laws now on the books in any State. We also gave the Federal Reserve

Board the authority to add disclosures in the future." 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

The Attorney General misuses the legislative history to distort Congress' intent. He points to the statement in the Senate Banking Committee Report that the preemption provision does not "apply to the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices." *See* Attorney General's Brief at 3 (quoting S. Rep. No. 100-259, at 9 (1987), *reprinted in* 1988 U.S.C.A.A.N. 3936, 3945). The Attorney General incorrectly asserts that this passage gives the States the absolute right to use such statutes for any purpose. *See* Attorney General's Brief at 21-23.

This Court has consistently held that, if the legislative history is inconsistent with the plain meaning of the statute, the plain meaning of the statute prevails. *See BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183, 186-87 (2004); *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991). Section 1610(e) expressly states that the use of State statutes is limited solely to enforcement of TILA's requirements.[3]

The Attorney General's reliance on the administrative materials is likewise misplaced. *See* Attorney General's Brief at 5-6. Those materials merely state the non-controversial proposition that the use of "state laws prohibiting deceptive acts or practices" is not barred. *See* 12 C.F.R. pt. 226, Supp. I, ¶ 28(d)(3); Truth in Lending: Credit and Charge Card Disclosures (Final Rule), 54 Fed. Reg. 13,855, 13,864

[3] For the same reason, the Attorney General's purported reading of the House Conference Report, see Attorney General's Brief at 4, is erroneous.

(Apr. 6, 1989). That proposition proves nothing. The States are not absolutely barred from using such statutes—they are barred only from using them to impose additional disclosure obligations.

POINT III

THE COURT OF APPEALS MISCONSTRUED THE SCOPE OF SECTION 1610(e)

The Court of Appeals effectively eviscerated the express preemption set forth in Section 1610(e) when it held that the statute's preemptive effect is limited to State action that is inconsistent with the specific disclosure requirements actually adopted by the Federal Reserve Board under Regulation Z—a classic "conflict" type of preemption. *See* Petition at 29-33. That holding renders Section 1610(e) a nullity because TILA already had a conflict provision in Section 1610(a) that, regardless of Section 1610(e), preempts inconsistent state law requirements. *See id.* at 26-28.

As Judge Read observed in her dissent, the majority restricts Section 1610(e) to bar only state action that would be inconsistent with actual disclosure requirements established by the Federal Reserve Board. *See* App29a-31a, 39a-40a. The majority insisted that there was no conflict because CCB's disclosure of credit limits and initially available credit "do not constitute the disclosure of any information 'which is subject to the requirements of [*sic*] 1637(c).'" *See* App11a (quoting 15 U.S.C. § 1610(e)). The majority concluded:

> Section 1610(e) preempts only those state laws that relate to the format, content, manner, or substance of the *TILA-required dis-*

> *closures*. Thus, there is no preemption here because neither [the Attorney General's] claims nor the relief it was granted have any effect upon *those disclosures*.

App15a (emphasis added).[4] The Court of Appeals reasoned that the relief sought by the Attorney General did not impose any disclosure obligations. The Attorney General echoes that assertion and contends that all he sought to do here was to prohibit deceptive practices. *See* Attorney General's Brief at 23-25.

The Attorney General's argument is a quintessential example of elevating form over substance. The Attorney General's distinction between disclosure requirements and the prohibition against false and deceptive statements is both specious and contrary to the principles of broad preemption.

Section 1610(e) bars the States from imposing any disclosure obligation, regardless of how it seeks to achieve such a result. In other words, Section 1610(e) prohibits both direct and indirect attempts to regulate disclosures.

There is no doubt that the Attorney General sought to impose disclosure requirements and that he succeeded in persuading the New York courts to do so. That fact is made plain by the intermediate appellate ruling that the Court of Appeals affirmed. The Appellate Division held, among other things:

[4] The Court of Appeals concluded that, prior to the Federal Reserve Board proposal in 2007 to require disclosures about credit limits, there was a void that the States were entitled to fill until the Federal Reserve Board affirmatively acted. See App14a-15a, App21a-22a n.14.

> [W]e agree that the violations were established as a matter of law. The offers had a prominent display informing consumers they had been "pre-approved" for a credit limit up to $1,000 or $2,500. *They did not state that most consumers who received these solicitations do not receive even half the amount listed.* While minimum credit limits were detailed in the solicitations, *no disclosures revealed how likely a consumer was to receive amounts above the minimum.* Scripts used by telemarketers to solicit consumers did not clarify this information or reveal credit limits usually granted. In response to the representation by CCB's vice president, Paul Seitz, that these problems had been corrected since June 2001, our review of the new disclosures found the correction to be embedded on the second page of the "Terms and Conditions of Offer," *in the same typeface as the rest of the paragraph.* Recognizing that Respondent submitted the affidavit of Donald Whittaker, a private consultant who reviewed the terms of the solicitation from December 2001, categorizing the disclosure as "unsurpassed in the industry," we find Supreme Court to have correctly determined that neither of these proffers addressed the obvious problems associated with the initial solicitations.

App55a-56a (emphasis added).

As this illustration demonstrates, the relief obtained by the Attorney General necessarily imposes disclosure requirements. The Attorney Gen-

eral wrongly insists that there is no disclosure requirement because CCB has the option of saying nothing at all. *See* Attorney General's Brief at 24. That argument cannot withstand scrutiny. The trial court directed that, when CCB disclosed the range of credit limits, CCB also had to disclose the amount of the credit likely to be received in the same prominent manner. The fact that this disclosure obligation is conditional does not change its nature. Any disclosure requirement, be it mandatory or conditional, trespasses on the exclusive authority granted to the Federal Reserve Board to establish national uniform requirements.

Further, as this Court has recognized, preemption equally applies when the federal regulator chooses to be silent and not to impose additional obligations. The decision to do nothing is entitled to the same preemptive effect as a decision to impose a requirement. In *Morales*, this Court rejected the contention that State action is preempted only if it affirmatively requires a different or additional affirmative disclosure. 504 U.S. at 385 ("Petitioner contends that [the ADA] only pre-empts the States from actually prescribing rates, routes, or services. This simply reads the words 'relating to' out of the statute."); *see U.S. v. Locke*, 529 U.S. 89, 111-12, 115 (2000); *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 385 (1983). Thus, the States are not free to impose disclosure requirements unless and until the Federal Reserve Board adopts new disclosure obligations regarding credit limits such as those that it proposed in 2007. *See* App49a.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Dated: December 19, 2008

Respectfully submitted,

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109

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THE PEOPLE OF THE STATE OF NEW YORK,
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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF OF AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE, AND THIRTEEN STATE BANKING ASSOCIATIONS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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October 28, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI 3

REASONS WHY THE WRIT SHOULD BE GRANTED 5

I. THE *FAIR CREDIT AND CHARGE CARD DISCLOSURE ACT* AMENDMENTS TO TILA RECOGNIZE THAT THE CREDIT CARD MARKET IS NATIONAL IN SCOPE 6

II. CONGRESS BALANCED THE BURDEN PLACED ON THE BANKING INDUSTRY BY EXPRESSLY PREEMPTING STATE LAW. 11

III. THE *FAIR CREDIT AND CHARGE CARD DISCLOSURE ACT* FULLY PREEMPTS STATE LAW REGARDING CREDIT CARD DISCLOSURES TO FACILITATE THE ABILITY OF FINANCIAL INSTITUTIONS TO OFFER CREDIT CARD PRODUCTS ON A NATIONWIDE BASIS. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Statutes

15 U.S.C. § 1601(a) 6
15 U.S.C. § 1610(e) 2, 17
15 U.S.C. § 1637(c) (2005) 7, 19
15 U.S.C. §§ 1632 (1988) 7
Fair Credit and Charge Card Disclosure Act, Pub. L. No. 100-583, 102 Stat. 2960 (1988). 7

Regulations

12 C.F.R. § 226.28(d) (2007) 18
12 C.F.R. Part 226, Supplement I (Official Staff Interpretations) 18

Other Authorities

54 Fed. Reg. 13855-01 (April 6, 1989); 1989 WL 276413 7
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134 Cong. Rec. E3574-02, 1988 WL 182027 (Oct. 21, 1988) 14
General Accountability Office, Report to the Ranking Minority Member, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate (September 2006) 4
Testimony of Richard H. Neiman, Superintendent of Banks, New York State Banking Department, on behalf of the Conference of State Bank Supervisors, Before the Financial Services Subcommittee on Financial Institutions and Consumer Credit of the United States House of Representatives (June 7, 2007) 15

IN THE SUPREME COURT OF
THE UNITED STATES

CROSS COUNTRY BANK, INC.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK, by ANDREW CUOMO, Attorney General of the State of New York,

Respondent.

BRIEF OF AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE, AND THIRTEEN STATE BANKING ASSOCIATIONS

At issue in this case[1] is the preservation of one of the foundational concepts governing the regulation of credit card applications or solicitations: that the disclosure of information regarding the terms of the credit offered to a potential customer is governed by

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[1] This brief is filed with the written consent of Petitioners and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than ABA and its members, made a monetary contribution to the preparation or submission of the brief.

a *uniform* set of federal rules that applies across each of the fifty states. Congress created such a uniform system when it amended the *Truth In Lending Act* ("TILA") in 1988 to regulate the disclosure of the relevant terms of a credit card solicitation to potential customers. In particular, Congress amended TILA to include an express preemption clause providing that TILA's credit card solicitation disclosure requirements, together with implementing regulations promulgated by the Board of Governors of the Federal Reserve (the "Federal Reserve"), supersede "*any* provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation." 15 U.S.C. § 1610(e) (emphasis added).

The nationwide uniformity that Congress thereby mandated for regulation of credit card disclosures is critical: the relevant market for the nation's credit card issuers is not just one or two jurisdictions, but rather it encompasses all fifty states. It was in recognition of this fundamental fact that Congress comprehensively preempted all state law in this area and delegated the task of setting national standards for credit card solicitation disclosures to a single federal agency, the Federal Reserve. The New York Court of Appeals' ruling casts aside this statutorily-mandated uniformity and threatens to balkanize credit card regulation, subject consumers to an ever-expanding mishmash of confusing credit card disclosures and burden issuers with a patchwork of inconsistent state laws regarding the adequacy of credit card disclosures. Such a result cannot be reconciled with the express Congressional determination to impose an across-the-board

preemption of state law in favor of a uniform nationwide disclosure regimen crafted, updated and maintained by a single federal regulatory authority, the Federal Reserve.

INTEREST OF THE AMICI

Amicus Curiae American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

The Consumer Bankers Association ("CBA") is a nonprofit national trade association founded in 1919. CBA provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

The Financial Services Roundtable is a national association whose membership represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for $66.1 trillion in managed assets, $1.1 trillion in revenue, and 2.5 million jobs.

Also appearing as *amici* are state bankers associations from 13 different states, including the New York Bankers Association.[2] These associations represent the interests of their members (which include state and federally chartered banks, as well as savings and loan associations). They provide a voice for the industry in state legislatures across the nation, as well as providing support to their members with research and information, public relations, continuing professional education, and business development.

The *amici* have a direct interest in the outcome of this litigation. According to the Government Accountability Office ("GAO"), commercial banks are the largest issuers of credit cards in the United States; based on the most recent figures available, more than 6,000 depository institutions in the United States issue credit cards.[3] The outcome of this case directly affects the manner in which credit card issuers solicit customers in New York and, potentially, other states as well.

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[2] Joining the brief are the California Bankers Association, the Delaware Bankers Association, the Georgia Bankers Association, the Illinois Bankers Association, the Kentucky Bankers Association, the Michigan Bankers Association, the Missouri Bankers Association, the Nevada Bankers Association, the New York Bankers Association, the Oregon Bankers Association, the Pennsylvania Bankers Association, the Tennessee Bankers Association, and the West Virginia Bankers Association,

[3] Government Accountability Office, Report to the Ranking Minority Member, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate (September 2006), at 10. Available at http://www.gao.gov/new.items/d06929.pdf.

REASONS WHY THE WRIT SHOULD BE GRANTED

The *Amici* respectfully submit that the Court should grant review to avoid perpetuating an erroneous precedent that is harmful to the nation's banking and credit card industry – a harm that will spread as it is adopted in other jurisdictions. While the suit brought by the New York Attorney General is based upon state statutes designed to address unfair and deceptive practices – statutes that do not *overtly* attempt to regulate credit card disclosures – the *Amici* are concerned that the practical result of the New York Court of Appeals' decision is to engraft on to the uniform federal disclosure requirements under TILA a special set of disclosure rules for New York residents. *Amici* certainly do *not* condone or defend any activity or solicitation by a credit card issuer that is unscrupulous or deceptive.[4] However, the Court should not abide New York's attempt to short-circuit the uniform regulatory scheme created by Congress, whatever its motivation may be. Congress deliberately designed the federal statutory scheme in a manner that established a *nationally uniform* set of standards for credit card solicitations via rulemaking by the Federal Reserve. Under the Supremacy Clause, those standards preempt any state action such as that taken by New York in this case.

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[4] *Amici* take no position regarding the alleged practices at issue in this case.

I. THE *FAIR CREDIT AND CHARGE CARD DISCLOSURE ACT* AMENDMENTS TO TILA RECOGNIZE THAT THE CREDIT CARD MARKET IS NATIONAL IN SCOPE.

When Congress enacted TILA in 1968, its stated purpose was to provide a statutory scheme that assured "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). TILA sets forth a variety of credit-related disclosure requirements, which, pursuant to Congressional directive, have been implemented through regulations promulgated by the Board of Governors of the Federal Reserve, 12 C.F.R. Part 226 (2007) (known as Regulation Z).

After twenty years of experience with the statute, Congress amended TILA in 1988 when it enacted the *Fair Credit and Charge Card Disclosure Act* ("FCCCDA"), Pub. L. No. 100-583, 102 Stat. 2960 (1988). The purpose of the amendments was

> to provide for more detailed and uniform disclosure of rates and other cost information in applications and solicitations to open credit and charge card accounts. Consumers will be given basic cost information about credit and charge cards at an earlier time than under the current provisions

> of the TILA in order to enhance credit shopping.[5]

The FCCCDA amendments enacted by Congress required changes to both the substance and the form of solicitations and applications for credit card products, prescribing a detailed set of uniform requirements for disclosures in such solicitations and applications. *See* 15 U.S.C. §§ 1632 (1988); 15 U.S.C. § 1637(c) (2005). The FCCCDA was notable for the creation of the now-familiar data table known as the "Schumer box" (in recognition of the role played by Representative (and now Senator) Charles Schumer in implementing this change) that breaks down the relevant terms of the credit product on offer.

The utility of standardizing, on a nationwide basis, TILA's requirements for credit card disclosures as a tool to empower consumers was not lost on Congress. Prior to the 1988 amendments, it was difficult for consumers to make meaningful comparisons of credit card offerings. Representative Schumer noted during the debate over the approval of the FCCCDA Conference Report that:

> When I first became involved in this issue several years ago, I was shocked to realize that consumers had no way of comparing the interest rates different cards charge. They had no way of knowing the grace period for repayment. And sometimes the annual fee the card charged was not even

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[5] 54 Fed. Reg. 13855-01 (April 6, 1989); 1989 WL 276413.

> listed. Credit card consumers were buying a pig in a poke.
>
> *****
>
> I am optimistic that this bill will result in millions of savings for consumers. The bill will ensure that every consumer knows the real cost of all credit cards and allows them to shop around for the lowest rates.[6]

Representative Schumer's comments acknowledging the benefit to consumers of being able to compare "apples to apples" with respect to credit card offers were echoed by Representative John Hiler from Indiana:

> The disclosure provisions of the bill will benefit consumers in several ways. First, the disclosure provisions may enhance competition among credit and charge card providers, allowing the marketplace to operate more efficiently and resulting in lower interest rates and other more favorable terms. Second, clear disclosure of key terms will help consumers to understand better what obligations they will incur under various credit card programs. Third, this advance information will allow consumers to make better informed comparisons among credit plans

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[6] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

> without the need to first complete the application process. *Finally, the conference report adopts a single uniform Federal standard that will greatly assist consumers in comparison shopping between credit card programs.*[7] (Emphasis added).

Likewise, Representative Doug Barnard, Jr., from Georgia re-emphasized that the ability to compare the relevant terms of a credit offering is an important part of the legislation:

> It is a bill requiring comprehensive fair, simple and uniform disclosure of the basic terms of credit cards, which are the Nation's third medium of exchange after checks and cash.
>
> Disclosure is fundamental to a competitive economy. Credit is a resource or a commodity like any other and if the price and other relevant terms are disclosed in advance of the transaction, consumers can obtain the best product at the lowest price.
>
> When you go to purchase a TV, you look at the price and other features. Among several TV's of the same size, you may choose the cheapest with fewer features or you may pay more for a feature like remote control even though picture size and quality are the

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[7] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

> same. You also may be able to purchase that same TV cheaper at another store or you may be willing to pay more at a store that delivers or is close to home. It's your choice, and as long as you have the necessary information you can make the optimum decision for yourself.
>
> The situation is no different for credit cards. Some cards offer a lower rate but no grace period. Others offer features like a grace period, merchandise rebates, travel services and the like. *If these terms are disclosed conspicuously in the same manner and location according to the type of application or solicitation, as provided by H.R. 515, then consumers can choose the card and combination of terms best for them.*[8] (Emphasis added).

See also Remarks of Representative Fernand St. Germain, 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988) ("The legislation requires uniform disclosures of interest rates and other fees that consumers face in making a decision to apply for a credit or charge card.").

The debate in the House of Representatives regarding the FCCCDA Conference Report leaves no doubt that *uniformity* in the mandated disclosures

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[8] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

was deemed to be a critical element in enabling consumers to understand and compare in a meaningful way the features and cost of credit card products they are being offered. Moreover, Congress recognized that nationwide uniformity required that the disclosure requirements mandated in the FCCCDA be linked with an express provision for preemption of state law. By expressly providing for such preemption, Congress balanced the burden imposed on the banking industry with the benefit to both the industry and consumers of the new disclosure requirements by making credit card offers subject to a single, uniform *federal* standard.

II. CONGRESS BALANCED THE BURDEN PLACED ON THE BANKING INDUSTRY BY EXPRESSLY PREEMPTING STATE LAW.

A full understanding of the preemption issue currently before the Court depends in part upon a recognition of the fact that the disclosure provisions of the FCCCDA were enacted as one piece of a larger compromise over the entirety of the FCCCDA. Industry support for this landmark legislation was tied to provisions in the House version of the bill that, in exchange for tougher disclosure rules, ensured that the banking and credit card industry would not be subject to a patchwork of state laws regarding credit card disclosures.

During the Congressional debate leading up to the passage of the FCCCDA, one of the points of contention was whether the states should be left free to enact their own statutes that would supplement the disclosures mandated under the amended provisions of TILA. In order to gain industry support for the stronger disclosure requirements, the House

version of the bill, H.R. 515, contained a provision that expressly preempted state law regarding credit card disclosure – the same provision that eventually was enacted into law as 15 U.S.C. § 1610(e).

Some, like Representative Frank Annunzio from Illinois, opposed the bill on the grounds that the preemption provisions would

> strip States of their power to provide additional protection for their citizens. Currently, there are 10 States with credit card disclosure laws. The 82 million citizens of those States-who make up one-third of the population of this Nation-will lose the protections that their elected State representatives gave them if we preempt their laws. The legislatures of the other 40 States will be told that they are barred from protecting their citizens.[9]

Representative St. Germain expressed a similar preference for amendments that would have preserved the ability of the states to enact credit card disclosure laws:

> Mr. Speaker, there was a great deal of discussion about the relationship of the Federal law to the various State disclosure laws.

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[9] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

> Some of us, frankly, had hoped that we could avoid a flat preemption of State laws and allow the so-called truth-in-lending approach to apply-an approach which would have allowed States to enact credit card disclosure laws so long as they were not inconsistent with the Federal law.[10]

The compromise that was ultimately struck, however, resulted in a bill that rejected continued reliance on the existing conflict preemption clause in TILA,[11] and instead expressly preempted state law while at the same time mandating disclosures that were "tougher than any current State law."[12] Concerns raised by those Representatives troubled by the blanket preemption of state law contained in the bill were addressed via a specific grant of authority to the Federal Reserve that would allow that regulatory agency to supplement the consumer disclosure provisions via regulation – in essence taking over the role that had historically been

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[10] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

[11] When it was initially enacted in 1968, TILA preempted only "inconsistent" state law, *i.e.*, state laws whose application would conflict with TILA's requirements. *See* 15 U.S.C. § 1610(a)(1). That standard still applies to certain TILA provisions, but *not* to the provisions governing credit card solicitations and applications.

[12] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988)(Comments of Rep. Barnard). See also comments of Rep. St. Germain, *Id.* ("Ultimately, however, we settled on a compromise which...brought the provisions of this legislation to the outer limits of the strongest laws now on the books in any State.").

accorded to state legislatures under TILA. This grant of authority to the Federal Reserve

> is an important element of the bill, and is in response to the fact that the bill would preempt state credit card disclosure laws. For example, if the Board finds that additional disclosures – such as any that could be required in the two States – Wisconsin and Illinois – that may require additional disclosures than does the Federal law – are necessary to carry out the purpose of the law, the Board has the authority to add these disclosures to the Federal law."

Speech of Representative John J. La Falce (New York), 134 Cong. Rec. E3574-02, 1988 WL 182027 (Oct. 21, 1988). One significant difference, however, between the historic practice of relying upon state legislatures to supplement TILA disclosures and the FCCCDA approach of authorizing the Federal Reserve to adopt regulations to supplement the mandatory credit card disclosures is that any regulation promulgated by the Federal Reserve applies *uniformly* across all 50 states – not just within a single state jurisdiction – and it has the full force and preemptive affect of federal law.[13]

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[13] More recently, the Superintendent of Banks for the New York Banking Department somewhat begrudgingly reached a similar conclusion in testimony before Congress:

> Given an industry that is dominated by national bank credit card issuers and subject

(...continued)

Finally, for some members of the Conference Committee, the compromise on preemption made sense given the fact that the credit card market is truly national in scope and that a large percentage of the credit card industry operates in multiple jurisdictions.

This fact raised the strong possibility that the majority of institutions serving this national market would have been subject to conflicting state-mandated disclosure rules, making a compromise on the preemption issue both appropriate and necessary:

> ...[C]redit cards, unlike mortgages, or auto loans, or home loans, are indeed a national industry. The large issuers

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(...continued)

> to the realities of federal preemption, state regulation of credit card practices is presently not a viable option. State regulation would apply only to a minority of consumers and would have the unfortunate and unintended consequence of putting state chartered entities at a competitive disadvantage. *Based on court decisions it seems that the only option is for the federal government to adopt national standards to address credit card problems on a nationwide basis which would then protect all of the citizens in our states.*

Testimony of Richard H. Neiman, Superintendent of Banks, New York State Banking Department, on behalf of the Conference of State Bank Supervisors, Before the Financial Services Subcommittee on Financial Institutions and Consumer Credit of the United States House of Representatives (June 7, 2007), at 10. Available at: http://www.house.gov/apps/list/hearing/financialsvcs_dem/htneiman060707.pdf.

> control a lot of the market. If they are willing to go for tough disclosure, provided that they do not have to make different types of disclosure in each of the 50 States, that to me is a trade that benefits consumers, and it is a trade that ought to be made.[14]

The concerns that motivated Congress to recognize the wisdom of compromise and enact a statute that expressly preempts any state laws concerning credit card disclosures twenty years ago remain today. Uniformity of regulation and the avoidance of a patchwork of state laws regarding the adequacy of credit card disclosures are necessary to facilitate the smooth and efficient operation of our nation's interstate banking and credit card industry. The New York Court of Appeals' decision threatens to destroy this compromise, and the Court should grant the petition for review in order to overturn that ruling.

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[14]134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988)(Comments of Rep. Barnard).

III. THE *FAIR CREDIT AND CHARGE CARD DISCLOSURE ACT* FULLY PREEMPTS STATE LAW REGARDING CREDIT CARD DISCLOSURES TO FACILITATE THE ABILITY OF FINANCIAL INSTITUTIONS TO OFFER CREDIT CARD PRODUCTS ON A NATIONWIDE BASIS.

The *Amici* submit that the Court should set aside the lower court's ruling that provisions of the New York General Business Code may be used to create a special set of disclosure rules for New York residents. The preemption provisions enacted as part of the FCCCDA amendments to TILA fully preempt *any* state law relating to the disclosure of information in any credit or charge card application. 15 U.S.C. § 1610(e). This conclusion is compelled by the plain language of the statute, the unambiguous legislative history of the FCCCDA, and the official staff interpretation of TILA rendered by the Federal Reserve.

Section 4(2) of the FCCCDA amended TILA to provide for the complete preemption of *any* state law "relating to the disclosure of information in any credit or charge card application or solicitation. . . ." 15 U.S.C. § 1610(e). Section 1610(e) provides that:

> The provisions of subsection (c) of section 1632 [which relates to the form of credit and charge card application disclosures] and subsections (c), (d), (e) and (f) of section 1637 [which relates to the content of required credit and charge card application and annual fee renewal disclosures] *shall supersede any provision of the law of any State relating*

> *to the disclosure of information in any credit or charge card application or solicitation* which is subject to the requirements of section 127(c) . . . or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

15 U.S.C. § 1610(e) (emphasis added). Consistent with the statutory language, the Federal Reserve's implementing regulations for TILA – Regulation Z – reflect this "special rule" regarding the enhanced preemptive affect of TILA's rules governing credit card disclosures:

> State law requirements relating to the disclosure of credit information in any credit or charge card application or solicitation that is subject to the requirements of section 127(c) of chapter 2 of the act (§ 226.5a of the regulation [relating to required credit and charge card application disclosures]) . . . are preempted.

12 C.F.R. § 226.28(d) (2007)(emphasis added). The broad preemptive effect mandated by the language of the statute and implementing regulation is confirmed by the Official Staff Interpretation to Regulation Z: "[t]he Fair Credit and Charge Card Disclosure Act *fully preempts* state laws relating to

the disclosure of credit information in consumer credit or charge card applications or solicitations."[15]

The *Amici* submit that the Court of Appeals' ruling below imposes disclosure obligations that differ in substance and form from those required by TILA. The fact that the New York Attorney General's case is based upon state statutes designed to address unfair and deceptive practices that do not overtly attempt to regulate credit card disclosures cannot mask the preemptive effect of 15 U.S.C. § 1610(e) and Regulation Z. The action brought against Petitioners by the New York Attorney General plainly undermines the ability of the credit card and banking industry to rely upon the TILA rules to determine the adequacy of the disclosures made in credit card solicitations. As is made plain by TILA itself, state laws may be "employ[ed]" only "for the purpose of enforcing the requirements of [Sections 1637(c) and 1637(d) of TILA]." The intention of Congress was clear: credit card issuers are to be subject to tough requirements regarding solicitations, but those requirements are to be dictated solely by the Federal Reserve and must be *uniform* across the nation.

CONCLUSION

The outcome of this case will directly affect the manner in which credit card issuers solicit customers in New York and, most likely, other states as well. The Court should grant review to avoid perpetuating

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[15] 12 C.F.R. Part 226, Supplement I (Official Staff Interpretations).

an erroneous precedent that, if adopted in other jurisdictions, will directly harm the nation's banking and credit card industry.

Respectfully submitted,

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Gregory F. Taylor
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